SUPREME COURT, U.S.

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NO.

In The
Supreme Court of the United States
October Term, 1997

PETER CASTELLANO, et al.,

Petitioners,

v.

THE CITY OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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165 PP

QUESTIONS PRESENTED FOR REVIEW

Does the fact that there is a conflict between circuits respecting whether, in the context of post-employment benefits, the term 'qualified individual with a disability' includes former employees who can no longer perform the essential functions of their former employment under the Americans With Disabilities Act and related federal statutes and the fact that the EEOC has had to file amicus briefs in cases in various circuits, including the case at bar with varying results, justify granting of the writ of certiorari.

Is the dismissal of a complaint under FRCivP Rule 12 (b)(6) improvident when it is alleged in the complaint that prelitigation efforts by plaintiffs to garner information supporting federal causes of action were blocked by public officials acting under color of state authority, which dismissal precludes interposition of an answer to narrow the issues and prevents court-compelled discovery to create a record, amounting to a denial of a meaningful right to Petition for Redress of Grievances under the First Amendment.

Should a complaint survive a FRCivP Rule 12(b)(6) motion to dismiss when it alleges that an employee who is required to retire on disability pension, and must

give up the disability pension in order to receive deferred compensation for services rendered while the employee was on the job, which compensation is paid to retirees who did not retire on disability, and under circumstances where the commissioner has unfettered discretion to retain similarly disabled employees on the job which complaint alleges violation of the Americans With Disabilities Act and related federal disability statutes and the equal protection of the laws component of the 14th Amendment.

PETER CASTELLANO; THOMAS FAY; FRANK GAUGLITZ; RALPH VERNI; DOROTHY WOLKE; CARL CAPASSO; JOHN MCCANN; JOHN MELILLO; VINCENT ARRUZZESE; GEORGE ADELSON: ROBERT AGNESE; WILLIAM ADRAGNA; EDWARD AIELLO. WILLIAM ALLARID; ROBERT ALVINO; VINCENT AMBOROSE; WILLIAM ANGLUM; GERALD ANTHONY; MARTIN APPLEBAUM; ROBERT ARAKEL; ANTHONY AREBASIO; JOHN ASHE; JOHN AURICCHIO; HARRY BACKSTROM; JOSEPH SAGAROZZA; GARY BAKER; WILLIAM BALNER; JOHN SALOG; CHARLES J. BALSAMO, THOMAS BANKS; CHARLES BARKER; THOMAS BARRECA; JOHN F.BARRY; LEONARD BARTOLETTI; FRANK BASILE; VINCENT BATTIATO; FREDERICK BAUSER; JEFFREY BAYNON; EDGAR BEATTY; FRITZ O. BEHR; ROLAND BENEDETTI; ROLAND BERGAMINE; CATHERINE BERTOLINO; WILLIAM BIELAWSKI; LOUIS BIELE; ELLEN BJORKSTROM; RONALD BJORKSTROM; VINCENT BLASKO; ROBERT BLEUZE; FRANK BOLZ; PATSY BONNANNO; JOSEPH BORG; HAROLD BOYLAN; WILLIAM BOYLAN; JOSEPH BOZELLI; ROBERT BRACCO; RALPH BRECH; JAMES BRINSON; LAWRENCE BRODSKY; FRANCIS BRUEN; MICHAEL BRUNO; JOSEPH BUCETI; RUDOLPH BUCHOLZ; ROSARIO BUNONE; KIEREN BURKE; WILLIAM BURKE; JOSEPH BUTLER; RICHARD BUTLER; ROBERT BUTLER; ALFRED CAFFERATA; THOMAS CAHILL; DOMINICK CAIACCIA; CHARLES CALANDRA; ROBERT CALI; JOSEPH CALTAGIRONE; VINCENT CAMPBELL; EDWARD CANEPA; ROBERT CAPITANO; FRED CAPOBLANCO; RICHARD CARBERRY; STEVEN CARCATERRA; JAMES CAROLAN; GERALD CARRATURE; THOMAS CARROLL; JOHN CASSELS; PETER CASSI; JAMES CASSIDY; MICHAEL CASSIDY; JOHN CASTRELLO; FRANK CATALANO; PHILIP CERBINI; GEORGE CERRONE;

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EDWARD MARTINEZ; JOSEPH MARTINO; JOSEPH MARTUCCI; MICHAEL MASON; JOHN MASSARO; LOUIS MAURIELLO; JOHN MAURO; JOHN MAXWELL; RANDALL MAYER; ANTHONY MAZZARA; RONALD MAZZIE; SALVATORE MAZZOLA; WALLACE MEETEER; VINCENT MELI; JOHN MELONE; JOHN MENIG; ARTHUR MICOL; WILLIAM MIELKO; GERALD MILLER; WILLIAM MILLER; CARL MIONE; THOMAS MALLOY; ARTHUR MONAHAN; VINCENT MONTAGNA; WOODROW MOST; JAMES MOTTLE; THOMAS MUHFELD; BERNARD MULLIGAN; JOHN MULLIGAN; WILLIAM MUPO; FRANCISCO MURO; CORNELIUS MURPHY; HAROLD MURPHY; JOHN MURPHY; MICHAEL J. MURPHY, JR.; PAUL MURPHY; RICHARD MURPHY; ROBERT MURPHY; PETER MCANUFF; HUGH MACABE; JEROME MACCAMBRIDGE; JOHN MCHUGH; PATRICK MCCARTHY; FRANCIS MCCARVILL; THOMAS MCCOMISKEY; THOMAS MCCORMICK; FRANCIS MCCOY; RAYMOND MCDONNELL; MICHAEL MCDONOUGH; JAMES MCEVOY; GERALD MCGEAN; GEORGE MCGEVNA; JAMES MCGINNIS; JAMES MCGLYNN; FRANCIS MCGOVERN; THOMAS MCGREGOR; CORNELIUS MCGROARY; BERNARD MCGUIRE; ARTHUR MCHUGH; JAMES MCKEE; JAMES J. MCKEE, SR.; JAMES MCKENNA; JOHN MCLOUGHLIN; DENNIS MCMAHON; JOHN J. MCMAHON; WILLIAM J. MCNEILL; FRANCIS MCNULTY; MICHAEL MCNULTY; PETER MCNULTY; DENNIS MCSWEENEY; RICHARD NABET; ALBERT NACLERIO; ANTHONY NAPOLI; JOHN NEARY; JOHN NEMIA; RICHARD NERKO, JOHN NEUNDORF; JOSEPH NOCERA; PATRICK NOLA; WILLIAM NOVOTNY; DORTHEA O'BRIEN; DANIEL O'CONNELL; JOHN O'CONNOR; , TERRENCE O'DONNELL; JOHN O'GRADY; EUGENE O'HANLON; EVAN D. OKEN; KENNETH OLSEN; GERALD

O'NEIL; MATTHEW ORSI; JEREMIAH O'SHEA; WAYNE OXLEY; JOSEPH PADOVANO; JOHN PANICCI; ROY PENNENBACKER; ANTHONY PAPA; PHILIP PAPPAS; PETER PARDY; ANGELO PARISI; SEBASTIAN PASCALE; JAMES PAWELSKI; BRUNO PELLEGRINI; FRANK PENENO; BERNARD PERINI; CHARLES PETERS; GEORGE PETERSON; JOHN NEARY; JOHN NEMIA; RICHARD NERKO; WILLIAM NEUENDORF; JOSEPH NOCERA; PATRICK NOLA; WILLIAM NOVOTNY; DORTHEA O'BRIEN; DANIEL O'CONNELL; JOHN O'CONNOR; LORRAINE O'DONNELL; TERRENCE O'DONNELL; JOHN O'GRADY; EUGENE O'HANLAN; EVAN OKEN; KENNETH OLSEN; GERALD O'NEIL; MATTHEW ORSI; JEREMIAH O'SHEA; WAYNE OXLEY; JOSEPH PADOVANO; JOHN PANICCI; ROY PENNENBACKER; ANTHONY PAPA; PHILIP PAPPAS; PETER PARDY; ANGELO PARISI; SEBASTIAN PASCALE; JAMES PAWELSKI; BRUNO PELLEGRINI; FRANK PENENO; BERNARD PERINI; CHARLES PETERS; GEORGE PETERSON; THOMAS PETRIE; WILLIAM PETRILLO; DOMINICK PETRUCCELLI; JOHN PIAZZA; VINCENT PICCIOTTO; FRANK G. PICONE; LOUIS J. PILLER, JR.; JOSEPH PIZZONIA; ANTHONY PONSIGLIONE; JOHN POPPE; THEODORE PORLIDES; JOHN POSA; JAMES POWERS; POWERS MARGARET; RICHARD POWERS; PETER PRANZO; BENNIE PULICE; CHARLES G. PUSEY, JR.; JOSEPH QUILTY; THOMAS E. QUINN; WILLIAM QUIRK; EMILE RACINE; GASPARE RANDAZZO; JOHN REALE; THOMAS REEDER; ROCCO REGINA; THOMAS REICHLING; DOUGLAS REID; ROBERT REILLY; PHILIP REPACI; ROBERT REYNOLDS; ANTHONY RICCI; JOHN RIGGIO; FREDERICK RINGNELL; JOHN W. RIORDAN; FRANK RITORTO; ROBERT ROBINSON; MICHAEL ROCHE; JOSEPH ROMANELLI; ORLANDO ROMEO; SAUL ROSEMAN;

MARILYN RUDERMAN; JOSEPH RUGGIERO; PETER RUIZ; MARIO RUPPOLO; CHRISTOPHER RUSH; LOUIS RUSSO; FRANK RUTZINGER; RAYMOND SABEL; FRANK SALERNO; DOMINICK J. SALERNO; SONNY SALLUSTO; EDWARD SALVINSKI; WALTER SAMMON; JOHN SANTANELLO; SAMUEL SANTANGELO; STEVE SASALA; CARMEN A. SAVERINO; JOHN SCALA; RICHARD SCARDINO; ARTHUR SCARRY; JOHN SCARRY; JOSEPH SCAVO; BLAISE SCIAME; EDWARD SCHNELL; GEORGE SCHRAMM; EDWIN SCHWARTZ; DENNIS SCOTT; HARRY SCOTT; VINCENT SCOTTI; ERIC SEITZMAN; THOMAS SEPE; JOHN SHANLEY; MORTON SHAW; RICHARD SHEEHAN; IRWIN SILVER; ROBERT SISKONEN; JOHN SMULLEN; JOHN SMYTH; HAROLD SOLIDAR; GEORGE SORRENTINO; DANIEL J. SPELLACY; ALLEN SPARGEL; STEPHEN SPINELLI; RALPH SPINOLA; ROBERT SPRAGUE; RUSSELL STEINLE; DORIEN STITH; JOHN SULLIVAN; JOHN SUTERA; ROGER SWANSON; FRANK SWEENEY; ANDREW TANNARIELLI; SALVATORE TOARMINE; ALBERT TAYLOR; CHARLES TEBBENS; FRANK TRENTEROMANO; FRANK TETRO; ROBERT TOBUCK; ALFONSE TOCCO; JOSEPH TOSCANINI; NICHOLAS TREANOR; JOHN TUMINELLI; JOHN TURJACK; JOSEPH VANDERHOFF; DOMINICK VASSALLO; ANTHONY VECCHI; FRANK VENTO; PATRICK VICTOR; CASMIR VIDIKSIS; CHARLES VIDIKSIS; BARRY VOGEL; HENRY VOSE; EDWARD WALDMAN; ROBERT WARD; VINCENT WARD; JAMES WATERS; JOHN WATSON; DOUGLAS WEBER; WALTER WEINER; JAMES WHYTE; NORMAN WIENER; WILLIAM WILKEY; MICHAEL WOLSTENCROFT; JAMES WOODS; DONALD WYATT; EDWARD YANO; TYRONE YORIO; ORESTE YOVANE; JOSEPH ZAFFUTO; PAUL ZANKI; LOUIS ZAPPULLA; ARTHUR ZICCARDY; CHARLES

ZOLLO; MARIO ZUPI; JULIUS ZWAIL; ROBERT ZWEIGBAUM; FREDERICK J. ADRIO; PHILIP ALAGNA; ANTHONY ASARO; ANTHONY ATTANASIO; GERALD ATTANASIO; FRANK BAKER; EDWIN BARAGIOLA; RICHARD BELENZA; ROBERT T. BLUTEAU; ARTHUR BRAUN; HYMAN BROFSKY; GASPER BUA; NORBERT CAMPBELL; VINCENT M. CANGELOSE; NEIL COPOLONGO; CHARLES J. CAREY; JOSEPH CARMONA; ANTHONY S. CASTORO; GEORGE CATALDI; GEORGE J. CHAKEDIA; ROBYN CHAKWIN; ANTHONY J. CIOTTI; JOSEPH CITELLI; JOHN P. CORSELLO; JAMES T. COWAN, JR.; HENRY Z. CUNNINGHAM; FRANKLIN C'AMIANI; MICHAEL A. DEMCHAK; DANIEL J. DEPAGNIER; FRANCIS M. DERIENZO; JOHN DINANTO; EDWARD DOYLE; LEONARD FARBER; JAMES B. FERGUSON; DOMENIC FERRARO; CARMINE FIORILLO; BARTHOLOMEW FOLEY; MARRIAM GALLO; RAYMOND GARDELLA; THOMAS G. GEYER, JR.; MICHAEL GILEAD; WALTER GODFREY; JONATHAN GREENBERG; DANIEL J. GUNN; RICHARD HAGEN; STEPHEN HALLORAN; JOHN F. HANLEY; ROBERT HEMPHILL; ROBERT HOFER; MICHAEL A. HUGHES; ALFRED A. JULIA; JOHN R. JURIS; JOSEPH N. KAPLAN; MICHAEL J. KELLY; WILLIAM J. KELLY; JOSEPH LAMONICA; EDWARD P. LANIGAN; BRIAN LARKIN; WILLIAM LATHER; WILLIAM LATOUR; GEORGE K. LETTS; MARY LEVINE; PHILIP R. LIVOTI; AGOSTINO A. LUCENTE; DAVID LUGUIS; MICHAEL J. LYNCH; MARK MARINO; BRADFORD MARTIN; ARTHUR MEENAGH; DENNIS MENSCH; ANTHONY J. MISITI; JOHN R. MISSION; HARRY MITCHELL; THOMAS P. MORRIS; SALVATORE MOSCHELLA; DANIEL MURRAY; JOHN A. MCCORMACK; ARTHUR J. MCINTYRE; WALTER NULLET; RICHARD W. OLPE; JOHN F. O'NEILL; CONSTANTINE PAINAS;

ANDREW PANICO; JOSEPH R. PANTULIANO; RICHARD PASSERINO; THOMAS C. PUGLISI; BERNARD J. QUINN; JEROME A. RAPISARDI; HERBERT ROSENBERG; ALBERT L. SANTORO; MARVIN C. SARTORIUS; RANDOLPH SCHIMMENTI; THEODORE SCHONHANS; JOHN A. SCHREINER; ALBERT SEEDMAN; PHILIP SETTINERI; BRIAN P. SHANHAN; WILLIAM F. SMITH; GEORGE SOPILNICK; HOWARD J. STEIN; PETER TAROMINA; RAYMOND TREUBERT; ROBERT J. TREUBERT; ANTHONY VALICENTI; THOMAS E. VEYDODA; MICHAEL VIGNOLA, INDIVIDUALLY AND AS MEMBERS OF THE VARIABLE SUPPLEMENT COMMITTEE, A COMMITTEE IN FORMATION; PETER HARRIS, JOSEPH W. CHRISTIAN; MICHAEL A. CORTES; EDWARD MCCARTHY; RICHARD WEISEL; DONALD J. SCHRODER; FRANK A. LOMBARDO,

Petitioners,

V.

THE CITY OF NEW YORK; CITY OF NEW YORK; RUDOLPH GUILIANI, MAYOR OF THE CITY OF NEW YORK; TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND; TRUSTEE OF THE NEW YORK CITY SUPERIOR POLICE OFFICERS VARIABLE SUPPLEMENTS FUND; ALLEN HEVESE, COMPTROLLER OF THE CITY OF NEW YORK AND TRUSTEE OF THE NEW YORK CITY POLICE PENSION FUND AND TRUSTEE OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND AND TRUSTEE OF THE SUPERIOR OFFICERS' VARIABLE SUPPLEMENT FUND; WILLIAM BRATTON; THE STATE OF NEW YORK; GEORGE PATAKI, GOVERNOR OF THE STATE OF NEW YORK; THE NEW YORK STATE ASSEMBLY; THE NEW YORK SENATE

SENATOR; JOSEPH BRUNO, SENATOR, MAJORITY LEADER OF THE NEW YORK SENATOR; RONALD SENATOR, MEMBER OF THE NEW YORK STATE SENATE; DAVID DUDLEY, CHIEF COUNSEL TO SENATE MAJORITY LEADER; WILLIAM DOUGHERTY, ASSISTANT CHIEF COUNSEL TO THE MAJORITY LEADER; VICTORY FARLEY, COUNSEL TO STATE SENATOR MAJORITY LEADER; MAYOR'S OFFICE OF LABOR RELATIONS; NEW YORK CITY POLICE BENEVOLENT ASSOCIATION AND THEIR TRUSTEES ON THE POLICE PENSION FUND AND THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND; NEW YORK CITY DETECTIVE ENDOWMENT ASSOCIATION, AND THEIR TRUSTEES ON THE POLICE PENSION FUND AND THE SUPERIOR OFFICERS' VARIABLE SUPPLEMENTS FUND, NEW YORK CITY SERGEANTS' BENEVOLENT ASSOCIATES, AND THEIR TRUSTEES ON THE POLICE PENSION FUND AND THE SUPERIOR OFFICERS' VARIABLE SUPPLEMENTS FUND; SUPERIOR OFFICERS.COUNCIL CONSISTING OF THE LIEUTENANTS' BENEVOLENT ASSOCIATION AND THE CAPTAINS AND ABOVE, AND THEIR TRUSTEES ON THE POLICE PENSION FUND AND THE SUPERIOR OFFICERS'VARIABLE SUPPLEMENTS FUNDS,

Respondents.

PARTIES

The parties are those listed in the caption of the petition.

TABLE OF CONTENTS

Questions Presented for Review.....i

Parties.....iii

Opinions Below.....1

Statement of Jurisdiction.....1

Constitutional and Statutory Provisions..1

Statement of the Case..... 2

Argument

Point I.....7

Point II.....11

Point III.....15

TABLE OF AUTHORITIES

Castellano v Bd. Of Trustees of the Police Officers' Variable Supplements Fund, 737 F.2d 759 (2d Cir. 1991, cert denied, 502 U.S. 941(1991).....5,13

Castellano et al v The City of New York et al, 946 F.Supp 249 (S.D.N.Y. June 28, 1996), aff'd Castellano et al v The City of New York, et al., __ F3d__ (Docket 96-7290, 2d Cir. Feb. 24, 1998) reh'g denied __F.3d___ 2d Cir. Apr.15,1998).....1,8

EEOC v CNA Ins. Cos., 95 F.3d 1039 (7th Cir. 1996) 7

Gagliardo v Dinkins, 89 NY2d 62, 574 NE 2d 298 (1996) 5,6,9,14

Gonzalez v Garner Food Servs. Inc., 89 F.3d 1523 (11th Cir. 1996), cert denied, 117 S.Ct. 1822 (1997) 7

Graboski v Giuliani, 937 F.Supp 258, aff'd ___F3d___ (Docket 96-9257, 2d Cir. Feb 24, 1998)....8,12,13

Lyons v Legal Aid Soc., 58 F.3d 1512 (2d Cir. 1995).....15

McNemar v The Disney Store, 29 F.3d 510 (3d Cir. 1996).....7

Parker v Metropolitan Life Ins. Co., 99 F.3d 181 (6th Cir. 1996), aff'd 121 F.3d 1006 (6th Cir. 1997) cert denied, 1998 WL 15861.....7

CONSTITUTIONAL AND STATUTORY AUTHORITIES

United States Constitution,
First Amendment.....14

United States Constitution,
Fourteenth Amendment.....4

42 U.S.C. Sec. 1983.....2

Americans with Disabilities
Act:42 U.S.C. Sec. 12112(a)
et seq.....1,2,4,5,10

Sec. 504 Rehabilitation Act
of 1973:.....2,4,10

Federal Rules of Civil Procedure
Rule 12(b)(6).....4,16

New York City Administrative Code
Title 13 Sec. 13-252.....10,14

APPENDIX TABLE OF CONTENTS

Decision of Second Circuit, February 24,
1998.....A1

Decision of the District Court,
June 28, 1996.....A52

Order Denying Reargument,
April 15, 1998.....A73

Mandate of Second Circuit,
February 24, 1998.....A75

Judgment of District Court
June 28, 1998.....A77

Statutory Authorities.....A78

Complaint.....A84

OPINIONS BELOW

Castellano et al v The City of New York et al, 946 F.Supp 249 (S.D.N.Y. June 28, 1996)(A52), aff'd Castellano et al v The City of New York, et al., ____ F3d_____ (Docket 96-7290, 2d Cir. Feb. 24, 1998), (A1) reh'g denied ___F.3d____ (2d Cir. April 15, 1998). (A73).

STATEMENT OF JURISDICTION

The judgment in the U.S. District Court for the Southern District of New York entered June 28, 1996 (A77) was appealed to the Circuit Court of Appeals for the 2d Circuit which affirmed on February 24, 1998.(A1) A petition for a rehearing was denied on April 15, 1998.(A73) Jurisdiction is based final judgement by the Court of Appeals. The substantive grounds for jurisdiction is that the complaint asserted that persons acting under color of state authority were depriving the petitioners of rights under the Americans with Disabilities Act, ['ADA'], the Rehabilitation Act of 1973 and equal protection of the Laws component of the 14th Amendment to the U.S. Constitution. (A84).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED. (Appendix)

United States Constitution,

14th Amendment. A78
42 U.S.C. Sec. 1983. A78

Sec. 504 Rehabilitation Act of 1973:

29 U.S.C. Sec. 794 A79

Americans With Disabilities Act:

42 U.S.C. Sec. 12112(a). A81
42 U.S.C. Sec. 12131. A82
42 U.S.C. Sec. 12132. A82
42 U.S.C. Sec. 12132. A82

New York City Administrative Code:

Title 13 Sec. 13-252. A83

STATEMENT OF THE CASE

The basis for federal jurisdiction in the United States District Court, Southern District of New York was 42 U.S.C. Sec 1983 in that the complaint alleged that the defendants, acting under color of state authority, were depriving the petitioners of federally protected rights under the Americans with Disabilities Act, the Rehabilitation Act of 1973 and were depriving the petitioners of equal protection of the laws under the 14th Amendment.(A84)

The complaint (A84)alleged that the

petitioners are New York City Police Officers who retired on either accidental or ordinary disability and were and are all members of the New York City Police Pension Fund,['PPF'} and members of the respondent New York City Police Benevolent Association or the Superior Officer Council unions. Some of the petitioners have over 20 years service before the disability retirement and others have under 20 years. A benefit, known as the Variable Supplement Fund ['VSF'] was the result of contract negotiations between the city and police unions in 1968, and enabling statutes passed by the Legislature.

The complaint here alleged that the legislature in passing the enabling legislation did not exclude any retired member of the PPF from the payments. (par. 51-54 A98)

The VSF benefit is funded by excess earnings of the Police Pension Fund investments beyond that which would have been realized in fixed income securities. That excess is transferred to the Variable Supplements Fund.

In 1988 the variable nature of the benefit then at $2,500 became a defined benefit with $500 per year incremental raises until the year 2007 when the payment will reach $12,000 per year. (Par. 62, A103) The benefit does not involve the expenditure of public funds.

The petitioners are being denied

payment of the VSF benefit because they retired on disability.

The complaint alleged that some of the petitioners were forced to retire against their will; (Pars. 41-43, A94); that the they had no option choose the form of retirement (par. 43, A94); that there was no exclusion of any member of the PPF from the entitlement to the VSF; (Pars. 24-37, A90-93)

The complaint also alleged that the petitioners, exercising their First Amendment right to Petition for Redress of Grievances, did get the NYS Assembly to unanimously pass bills to create a commission to inquire into why they were being deprived the benefit, which legislation was supported by a number of Senators, but blocked from a vote by the procedural powers of senate leaders; (par. 55, A99) and that the circumstances cataloged in the complaint constituted a violation of the Americans With Disabilities Act, Sec. 504 of the Rehabilitation Act of 1973, and the equal protection of the laws under Fourteenth Amendment to the United States Constitution.

The respondents, did not answer and moved to dismiss under FRCivP Rule 12(b)(6) contending that VSF benefit is only payable to retired members of the PPF who did not retire on disability and who had served a minimum of 20 years and that the complaint did not allege facts which

would constitute causes of action under the federal law.

The district court (Stein, J.) held that the Petitioners were not qualified individuals under the Americans With Disabilities Act and that those petitioners over 20 years could have given up the disability pension in order to qualify for the benefit and those under 20 years should have remained on the job for 20 years in order to be placed in such a position. (A68) Appeal was taken to the 2d Circuit Court of Appeals.

During the pendency of the appeal, on October 22, 1996, the New York Court of Appeals in Gagliardo v Dinkins, 89 N.Y.2d 62,675 NE2d 298 (1996) defined the VSF benefit as deferred compensation for services rendered by the member while on the job and was not a pension benefit.

In Castellano v Bd. Of Trustees of the Police Officers' Variable Supplements Fund,937 F.2d 759 (2d Cir. 1991), cert denied, 502 U.S. 941 (1991) ['Castellano I'] the defendants there argued that the exclusion of officers who retired on disability from VSF benefits was a provision of the collective bargaining agreement. The Second Circuit ruled that the contract did not exclude by its terms any retired member of the PPF and that any exclusion must have been made by the legislature; and that the 2d Circuit would defer to the N.Y. Court of Appeals to define the VSF benefit. Gagliardo was

cited in petitioners' brief and argument in the 2d Circuit.

The EEOC appeared as amicus contending that the petitioners were qualified individuals with a disability under the ADA.

The 2d Circuit affirmed. In doing so however, it held that Petitioners were in fact qualified individuals to seek post-employment benefits under the ADA but affirmed the dismissal.(A33-34)

The 2d Circuit did vacate and remand the dismissal of a complaint by a firefighter, Serafino F. Valardi, pro se, whose case was heard at the same oral argument as the case at bar, because he had alleged he had no option to forgo the disability pension to get the VSF he had a federal cause of action. (A41-42)

The Petitioners moved for reargument citing contentions in their complaint upon which the 2d Circuit held justified remand in the Velardi case. The 2d Circuit denied reargument on April 15, 1998.(A73) This Petition is being filed within 90 days of the denial of reargument

ARGUMENT:

POINT I: A CONFLICT EXISTS BETWEEN THE CIRCUIT COURTS OF APPEALS RESPECTING THE TERM 'QUALIFIED INDIVIDUAL WITH A DISABILITY' AND WHETHER THE TERM APPLIES TO POST-EMPLOYMENT BENEFITS.

The Second Circuit at A24 recognized a conflict between circuits respecting the standing as a qualified individual with a disability to litigate post-employment entitlements under the ADA, citing Gonzalez v Garner Food Servs., Inc., 89 F.3d 1523, 1526-28 (11th Cir. 1996), cert denied, 117 S.Ct. 1822 (1997); EEOC v CNA Ins Cos., 96 F.3d 1039, 1043-45 (7th Cir. 1996) and Parker v Metropolitan Life Ins. Co., 99 F.3d 181, 185-87 (6th Cir. 1996), aff'd 121 F.3d 1006 (6th Cir. 1997, cert. Denied 1998 WL 15861 (1998), all of which deny standing as a qualified individual with a disability.(A24) Additionally the 3d Circuit in McNemar v The Disney Store, 19 F.3d 510 (3d Cir. 1996) held that a former HIV-positive employee who was unable to work is not covered post-employment by the ADA. The Second Circuit here held such former employees to be qualified individuals.(A10-33)

One important reason that the petition should be granted is that the EEOC appeared as amicus in McNemar and CNA

and in this case as well with conflicting results on the same issue. A definitive resolution of this conflict will alleviate the need for the multiple appearances in various parts of the country by the EEOC, thereby conserving its scarce resources for other enforcement imperatives.

The 2d Circuit here observed that Title I of the ADA expressly prohibits discrimination in the provisions of fringe benefits many of which are meaningful in a post-employment context.(A33-34)

The Court also observed that the district court here and dealing with police retirees holding them not to be qualified individuals was in conflict with another district court dealing with fire retirees claiming their VSF post-employment payment which held that they were. Castellano v City of New York, 946 F.Supp at 252-253 and Graboski v Giuliani, 937 F.Supp 258, 266.(A23).

The two appeals were heard by the 2d Circuit at the same time resulting in a multi-captioned decision by the 2d Circuit supporting the proposition that the petitioners were qualified individuals under the ADA.

The fact that the Petitioners prevailed in their argument that they are qualified individuals under the ADA does not render the matter moot. There is a conflict between the circuits. Moreover, ruling of the 2d Circuit suggests that an employee is compelled to surrender a

disability pension designed to address the physical condition of the employee in order to receive deferred wages for services already performed.(A38) What makes this state of affairs particularly egregious is that the VSF is funded by excess earnings of the Police Pension Fund of which all the petitioners were members, and the corpus of which was contributed to by the petitioners.

The ADA prohibits deprivation of a benefit or program of employment by reason of perceived disability. Once the 2d Circuit determined that the Petitioners were qualified individuals under the statute, it was and is error for it to conclude that the Petitioners may be deprived of being paid for work the petitioners already rendered while on the job just because the petitioner retired on disability.

The Gagliardo court correctly defined the VSF as not being a pension benefit. The disability retirement addresses the physical condition of the petitioner involved and has a rational basis. Depriving that petitioner because of disability retirement status of pay for services the petitioner rendered while on the job has no rational basis whatever.

The district court opined that the way to overcome this situation is for the member who is disabled to deny the member's disability pension which is in lieu of workers' compensation and to

retire on other than disability in order to receive the VSF payment. Not only is this discrimination based on disability, proscribed by the Americans With Disabilities Act, and Section 504 of the Rehabilitation Act of 1973, but a denial of equal protection of the laws under the 14th Amendment as well.

With respect petitioners under 20 years service, the district court had suggested, without any authority to support it, that they should have stayed around until the 20th year in order to qualify for the VSF benefit, and even then, the member would have to deny the disability in order to get the VSF benefit by retiring without the disability pension. (A68) This despite the fact that the complaint, deemed to be true for the purposes of the motion, alleged that some petitioners were forced off the job against their will. (A94). This gratuitous observation cannot stand in the face of Title 13,Sec.13-252 et seq., New York Administrative Code which gives the Commissioner the authority to remove a member of the force on disabilty against the member's will. (A83) The Complaint also specified that the member who retired on disability did not have an option to choose the VSF if more than 20 years was served. (Par 43, A94)

This is precisely the type of discrimination the federal laws were designed to prevent. For example, there

is no requirement that a person deny his or her race, or religion in order to qualify for an employment benefit. Here, even in the case of an officer shot in the line of duty who is rendered a paraplegic must deny his disability, give up the disability pension rationally imputed to the condition in order to get deferred payment for services the member already rendered which is funded by excess earnings of the PPF to which all the members, including the petitioners contributed.

The fact is that the member who is forced out under a commissioner's survey has no freely exercised option to select VSF. Those under 20 years have no option because the respondents wrongly claim that 20 years service is a requirement.

POINT II: THE REFUSAL OF THE 2D CIRCUIT TO GRANT REARGUMENT IN LIGHT OF ITS HOLDING IN VELARDI IS A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The 2d Circuit remanded the case of Serafino F. Velardi, a firefighter with over 20 yers and retiring on disability because he alleged that he was not accorded an option to reject the disability pension and choose to retire on other than disability in order to receive the VSF benefit. (A41) On reargument the

Petitioners asserted that they had similar assertions in their complaint, and suggested that the court may have subsumed their complaint with the Graboski firefighters case heard on oral argument at the same time.

It is obvious that the following assertions in the circuit court's oppinion do not apply to the petitioners, whose complaint mirrored the elements upon which the Velardi case was remanded. The court had designated those who retire before 20 years service as Class I and those with 20 or over as Class II. (A16)

1. At A37 the court indicated that the VSF payments are equally available to persons with and without disabilities who retire after 20 years of service. This is untrue. The disabled must give up a disability pension which is in lieu of workers' compensation and addresses their physical condition while those who are not disabled do not have to give up anything to get the VSF deferred compesation, which is not a pension benefit.

2. At A38 the court erroneously states that all petitioners here with over 20 years concede that they chose voluntarily to forgo for service in favor of disability retirement. In fact the complaint at pars. 41-43 at A94 specifically allege that some petitioners were forced off the job against their will and that the majority of plaintiffs were not informed that they had any option

respecting the VSF benefit, and that those compelled to retire before the 20th year had no option at all. These assertions in the complaint long before the Velardi holding mirror it in all aspects justifying a remand. If unlike firefighter Velardi, the firefighters in Gaboski did not allege it in their complaint, that has no bearing on the complaint allegations of the petitioners.

3. In Castellano v Bd. Of Trustees of the Police Officers' Variable Supplements Fund, 937 F.2d 759 (2d Cir. 1991), cert denied, 502 U.S. 941 (1991) ['Castellano I'] the defendants there argued that the exclusion of officers who retired on disability was a provision of the collective bargaining agreement. The Second Circuit ruled that the contract did not exclude by its terms any retired member of the PPF and that any exclusion must have been made by the legislature; and that the 2d Circuit would defer to the N.Y. Court of Appeals to define the VSF benefit.

That court in Gagliardo defined the VSF as deferred compensation for services rendered. The 2d Circuit here at A39 flat-out stated that petitioners' position that the VSF constitutes deferred compensation was undermined. To support the contention that the 2d Circuit may have subsumed the petitioners' complaint into the Gaboski considerations is borne out by the mistaken belief by the court

that it was Gabowski only that had brought to the attention of the 2d Circuit the Gagliardo definition. As a matter of fact the petitioners in their briefs before the 2d Circuit strongly argued Gagliardo claiming that to require one to give up a disability pension in order to get deferred payment for work already performed had no rational basis. Petitioners' suggestion on reargument that the circuit court may have subsumed petitioners' complaint into the Firefighter cases did not prevail.

Moreover in the first instance the district court realized that one compelled to retire on disability before the 20th year had no real or imagined option available The district court, without any basis suggested that such member should remain on the job until the 20th year. The suggested remedy does not exist. The Commissioner has the authority to force a member to retire on disability involuntarily, an assertion in the complaint par. 41-43 at A94, and supported by NYC Administrative Code, Ch. 13. The commissioner has unfettered discretion to retain and in fact has retained disabled members while forcing others out raising equal protection of the laws concerns.

The district court did not attempt to analyze the fact that those on disability retirement with over 20 years on the job have no real option because to receive the VSF benefit such member would have to give

up the pension which addresses the physical condition. Even were there evidence that such member had a choice, such choice would be coerced and the pension received would not be the one specifically designed to compensate for the disability.

POINT III: DISMISSAL OF THE COMPLAINT UNDER RULE 12(B)(6) DEPRIVED PETITIONERS OF THE ABILITY TO OBTAIN COURT-COMPELLED INFORMATION IN ORDER TO OBTAIN A RECORD, THEREBY IMPAIRING THEIR RIGHT TO PETITION FOR REDRESS OF GRIEVANCES.

The Petitioners had also argued that dismissing the complaint under Rule 12(b)(6) deprived them of the right to petition for redress of grievances under the First Amendment. The 2d Circuit held this argument frivolous, stating that the petitioners had not supported the assertion by any authorities (A49). This is incorrect. The petitioners specifically cited as authority one of the court's own precedents, Lyons v Legal Aid Soc., 68 F.3d 1512 (2d Cir. 1995). (motion for dismissal of the complaint under 12(b)(6) improvidently granted when the plaintiff did not have an opportunity for discovery for the purpose of creating a record and is a denial of due process, cited by the

Court in another context.)(A37)

The complaint had alleged that the plaintiffs pre-litigation had sought information from the legislature; that they had obtained bills unanimously passed by the Assembly and sponsored by a significant number of senators to garner information needed to seek redress; that the vote in the Senate was blocked by politically powerful senate leaders.(par.55 A99).

The complaint alleged that the Legislature did not provide for exclusion of any member from the VSF benefit. (par 51-54, A98) By granting the dismissal of the complaint in the light of the efforts of the petitioners to seek information from governmental authorities, the petitioners have been deprived of any meaningful right to petition for redress of their grievance by securing an answer to the complaint narrowing the issues and court-compelled discovery.

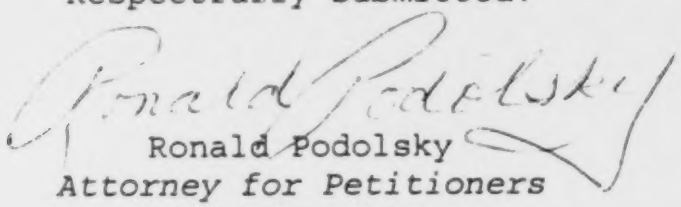
Because it has been shown that the petitioners have been blocked from legitimate pre-litigation efforts to garner information to support their contentions, the 12(b)(6) motion should have been denied. This is not only because the complaint standing alone does in fact state causes of action, but because discovery procedures in the FRCivP are there to assist litigants in obtaining during litigation under court compulsion that information which the adversary has

denied the litigant. Since the adversaries here are public officers or those engaging in state action, the deprivation of information is a particularly strong reason to permit an answer to be interposed and discovery allowed.

CONCLUSION: BY REASON WHEREOF THE PETITION SHOULD BE GRANTED.

Hauppauge, New York
May 21, 1998

Respectfully submitted:



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term of 1996

Argued June 9, 1997

Decided February 24, 1998

PETER CASTELLANO, et al.,
Plaintiffs-Appellants
-against-
THE CITY OF NEW YORK, et al.,
Defendants-Appellees.

RONALD GRABOSKI, et al.,
Plaintiffs-Appellants.
-against-
RUDOLPH GIULIANI, et al.,
Defendants-Appellees.

ALPHONSE ADORNETTI, et al.,
Plaintiffs-Appellants,
-against-
NEW YORK CITY EMPLOYEES RETIREMENT
SYSTEM, et al.,
Defendants-Appellees.

JOHN A. CLIFFORD, et al.,
Plaintiffs-Appellants,
-against-
NEW YORK POLICE PENSION FUND, et al.,
Defendants-Appellees.

SERAFINO F. VELARDI,

Plaintiff-Appellant

-against-

THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND,

Defendant-Appellee.

Before: OAKES, WALKER and PARKER, *Circuit Judges*.

Plaintiffs-appellants Peter Castellano et al. ("Castellano appellants:) appeal from the June 28, 1996 judgment by the United States District Court for the Southern District of New York (Sidney H. Stein, Judge) dismissing, pursuant to Fed. R. Civ. P. 12 (b)(6), their complaint under Titles I and II of the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. §12101 et seq. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§791 et seq. the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. §621 et.seq., the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and various claims under New York law. (No. 96-7920). See Castellano v. City of New York, 946 F. Supp. 249 (S.D.N.Y. 1996).

Plaintiffs-appellants Ronald Graboski et al. (Graboski appellants") and Serafino F. Velardi ("Velardi") appeal from the September 5, 1996 judgment by the United

States District Court for the Southern District of New York (Lewis A. Kaplan, Judge) dismissing, pursuant to Fed. R. Civ. P. 12 (b) (6), the Graboski appellants' complaint under Titles I and II of the ADA, section 504 of the Rehabilitation Act, the ADEA, the Contracts Clause, the Equal Protection Clause of the Fourteenth Amendment, and various claims under New York law, (No. 96-9257), and dismissing Velardi's complaint under Title I of the ADA. (No. 96-9237). See Graboski v. Giuliani, 937 F. Supp 258 (S.D.N.Y. 1996).

Plaintiffs-appellants Alphonse Adornetti et al. ("Adornetti Appellants") appeal from the September 9, 1996 judgment by the United States District Court for the Eastern District of New York (Eugene H. Nickerson, Judge) dismissing, pursuant to Fed. R. Civ. P.12(b)(6), their complaint under Titles I and II of the ADA, section 504 of the Rehabilitation Act, the Contracts Clause, the Equal Protection Clause of the Fourteenth Amendment, the Takings Clause, and various claims under New York Law. (No. 96-9289). See Adornetti v. New York City Employees' Retirement Sys., No 95-cv-3842, 1996 WL 518097 (E.D.N.Y. Aug 28, 1996)

Plaintiffs-Appellants John A. Clifford, et al. ("Clifford appellants") appeal from the March 6, 1997 judgment by the United States District Court for the Southern District of New York (Sidney H.

Stein, Judge) dismissing, pursuant to Fed. R. Civ. P. 12 (b) (6), their complaint under Title I of the ADA. (No. 96-9601). See Clifford v. New York City Police Pension Fund, No. 96-cv-6806 (S.D.N.Y. Mar 6, 1997).

Plaintiff-appellant Peter Harris ("Harris") appeals from the July 17, 1996 judgment by the United States District Court for the Southern District of New York (Kevin Thomas Duffy, Judge), dismissing, pursuant to Fed. R. Civ. P. 12 (b) (6), Harris's complaint under Title I of the ADA. See Houlihan v. City of New York, No. 95-cv-6373, 1996 WL 393576 (S.D.N.Y. July 15, 1996). Harris's appeal has been consolidated with the Castellano appeal, is included in the Castellano caption, and has the docket number 96-9004. We analyze Harris's ADA claim together with that of the other Castellano appellants.

We affirm all of the above judgments (Nos. 96-7920, 96-9257, 96-9289, 96-9601, 96-9004) except for the judgment dismissing Velardi's complaint (No. 96-9237), which we vacate and remand for further proceedings.

RONALD PODOLSKY, Hauppauge, New York, for Plaintiffs-Appellants in Docket Nos. 96-7920 and 96-9004 (CON.)

IRVING ARNOLIK, New York, New

York for Plaintiff-Appellant Peter Harris in Docket Nos. 96-7920 and 96-9004 (CON.)

JAMES J. DWYER, New York, New York (PAUL A. CROTTY,Corporation Counsel of the City of New York,John Hogrogian, Pamela Seider Dolgow,Anshel David, Marta B. Soja,of counsel, on the brief) for Municipal Defendants-Appellees in Docket Nos. 96-7920 and 96-9004 (CON.)

MARTIN BEINSTOCK, Assistant Attorney General, New York, New York (DENNIS C.VACCO, Attorney General of the State of New York,Barbara G. Billet, Solicitor General, Thomas D. Hughes, Assistant Solicitor General, of counsel on the brief) for State Defendants-Appellees in Docket Nos.6-7920 and 96-9004 (CON.)

ELLIOTT I. SUSSER, Lysaght, Lysaght & Kramer, P.C., Lake Success, New York for Defendants-appellees The Patrolmen's Benevolent Association of the City of New York and their Trustees on the Police Pension Fund in

Docket Nos. 96-7920 and 96-9004 (CON.)

JENNIFER S. GOLDSTEIN, Washington, D.C., (C. Gregory Stewart, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, on the brief) Amicus Curiae for Equal Employment Opportunity Commission in Docket Nos. 96-7920 and 96-9004 (CON.)

(Edward Copeland, Cary Lacheen, New York Lawyers for the Public Interest, New York, New York, Robert L. Schonfeld, Stein & Schonfeld, New York, New York, Amicus Curiae for American Civil Liberties Union, et al. In Docket Nos. 96-7920 and 96-9004(CON.)).

(Richard A. Dienst, Leslie H. Ben-Zvi, Dienst & Serrins, LLP, New York, New York for Defendants-Appellees Detectives' Endowment Association,Captains' Endowment Association,Sergeants' Benevolent Association and Lieutenants' Benevolent Association, New York City

Police Department in Docket Nos. 96-7920 and 96-9004 (CON.)).

KEVIN P. FITZPATRICK, Williston Park, New York, (Kevin P. Fitzpatrick, P.C., Williston Park, New York, Martin N. Silberman, Marc Alain Steier, Silberman & Rhone, P.C., New York, New York on the brief) for Plaintiffs-Appellants in Docket No. 96-9257.

JAMES J. DWYER, New York, New York (PAUL A. CROTTY, Corporation Counsel of the City of New York, John Hogrogian, Pamela Seider Dolgow, Anshel David, Marta B. Soja, of counsel on the brief) for Municipal Defendants-Appellees in Docket No.. 96-9257

TINA KREMENEZKY, New York, New York (Richard M. Betheil, Pryor,Cashman Sherman & Flynn, New York, New York joining in the brief for Municipal appellees) for Defendant-Appellee Uniformed Fire Officers Association and Uniformed Fire Officers Association Executive Board in Docket No. 96-9257.

MICHAEL N. BLOCK, New York, New York (Sullivan & Liapakis, New York, New York) for Defendants-Appellees Uniformed Firefighters Association and Trustees in Docket No. 96-9257.

(Daniel T. Campbell, P.C., Daniel T. Campbell, Floral Park, New York for Amicus Curiae COAPP-VSF, Inc. In Docket No. 96-9257)

MARTIN SILVERMAN, New York, New York (Silberman & Rhone, P.C., New York, New York, Kevin P. Fitzpatrick, Kevin P. Fitzpatrick, P.C, Williston Park, New York on the brief) for Plaintiffs-Appellants in Docket No. 96-9289.

JAMES J. DWYER, New York, New York, (PAUL A. CROTTY, Corporation Counsel of the City of New York, John Hogrogian, Pamela Seider Dolgow, Anshel David, Marta B. Soja, of counsel, on the brief) for Municipal Defendants-Appellees in Docket No. 96-9289.

TINA KREMENEZKY, New York,

New York (Richard M. Betheil, Pryor Cashman, Sherman & Flynn, New York, New York) for Defendant-Appellee Uniformed Fire Officers Association and Uniformed Fire Officers Association Executive Board in Docket No.96-9289.

MICHAEL N. BLOCK, New York, New York, (Sullivan & Liapakis, New York, New York) for Defendants-Appellees Uniformed Firefighters Association and Trustees in Docket No. 96-9289.

(Dennis C. Vacco, Attorney General of the State of New York, New York, New York, Barbara G. Billet, Solicitor General, Thomas D. Hughes, Assistant Solicitor General, Martin Beinstock, Assistant Attorney General, Of Counsel, New York, New York for State Defendants-Appellees in Docket No. 96-9289.)

JOHN A. CLIFFORD, Pro Se, Long Beach, New York in Docket No. 96-9601

JAMES J. DWYER, New York New York (PAUL A. CROTTY, Corporation Counsel of the City of New York, John Hogrogian, of Counsel) for Municipal Defendants-Appellees in Docket No. 96-9601.

SERAFINO F. VELARDI, Pro Se, Port St. Lucie, Florida in Docket No. 96-9237.

JOHN HOGROGIAN, New York New York (PAUL A. CROTTY, Corporation Counsel for the City of New York, New York, New York) for Defendant-Appellee in Docket No.96-9237.

WALKER, Circuit Judge:

In this appeal, various classes of police and fire officers in New York City who retired with disability pensions press their claims, rejected below, that the city and applicable pension funds are discriminating against them by denying them benefits form more lucrative variable supplement funds ("VSF") that are available only to retirees who retire after twenty years of service and who do not already receive disability pensions. This appeal also presents the threshold issue of whether a retiree on disability who is presently unable to perform the "essential functions" of his former

employment can still be a "qualified individual with a disability" within Title I of the Americans with Disabilities Act for the purpose of challenging alleged discrimination in the provision of fringe benefits. We answer this threshold question in the affirmative; however, with one exception we agree with the district courts that there is no disability discrimination in these cases and thus the motions to dismiss by defendants-appellees were properly granted. We also address and reject appellants' various arguments challenging the VSF statutory scheme under the United States Constitution and other federal statutes.

The following are the different groups of appellants, the judgments they have appealed from, and their claims before this court.

Plaintiffs-appellants Peter Castellano et al. ("Castellano appellants"appeal from the June 28, 1996 judgment by the United States District Court for the Southern District of New York (Sidney H. Stein, Judge) dismissing, pursuant to Fed. R. Civ. P. 12 (b)(6), their complaint under Titles I and II of the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. §12101 et seq., section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §791 et seq., the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. §621 et seq., the First Amendment, the Due Process and Equal

Protection Clauses of the Fourteenth Amendment of the United States Constitution, and various claims under New York law. (No. 96-7920). See Castellano v. City of New York 946 F. Supp. 249 (S.D.N.Y. 1996).

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Plaintiffs-appellants Alphonse Adornetti et al.(Adornetti appellant") appeal from the September 9, 1996 judgment by the United States District Court for the Eastern District of New York (Eugene H. Nickerson, Judge) dismissing, pursuant to Fed. R. Civ P 12 (b)(6), their complaint under Titles I and II of the ADA, section 504 of the Rehabilitation Act, the Contracts Clause, the Equal

Protection Clause of the Fourteenth Amendment, the Takings Clause, and various claims under New York Law. (No. 965-9289). See Adornetti v. New York City Employees' Retirement No. 95-cv-3842 WL 518097 (E.D.N.Y. August 28, 1996)

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Plaintiff-appellant Peter Harris ("Harris") appeals from the July 17, 1996 judgment by the United States District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) dismissing, pursuant to Fed. R. Civ. P. 12 (b) (6), Harris's complaint under Title I of the ADA. See Houlihan v. City of New York, No. 95-cv-6373, 1996 WL 393576 (S.D.N.Y. July 15, 1996). Harris's appeal has been consolidated with the Castellano appeal, is included in the Castellano caption, and has the docket number 96-9004. Harris's ADA claim is considered together with that of the Castellano appellants.

We affirm all of the above judgments (Nos. 96-7920, 96-9257, 96-9289, 96-9601,

96-9004) except for the judgment dismissing Velardi's complaint (No.96-9237), which we vacate and remand for further proceedings.

BACKGROUND

We set forth here only as much background as is necessary to the disposition of these appeals, all of which relate to the administration of VSFs to various classes of New York City police and fire officers.

A VSF benefit is a variable supplemental benefit disbursed to certain city retirees in addition to regular pension or retirement benefits, and funded by the investment earnings of various police and fire officer pension funds. See, e.g., N.Y.C. Admin. Code ("Code") §§ 13-232, 13-335. There are five VSFs relevant to these consolidated appeals: Code at §13-268 to §13-278 (police officers' VSF), §13-278 to §13-287 (police superior officers' VSF), §13-382 to §13-391.1 (firefighters' VSF), §13-392 to §13-401 (fire officers' VSF, and §13-191 to §13-193.5 (transit police officers' VSF). With the exception of the transit police officers' VSF, these VSFs originated directly from collective bargaining agreements ("CBSs") adopted in 1968 and 1970 between a number of police and fire officer associations and New York City, and implemented into law in 1970.

For all of the above classes of police and fire officers, there exist three basic types of retirement plans: (1) "ordinary disability" retirement for those who are "physically or mental incapacitated for the performance of duty and ought to be retired," Code at §§ 13-251, 13-352;) (2) "accident disability" retirement for those whose physical or mental incapacitation is a "natural and proximate result" of city-service, Code at §§13-252, 13-353; and (3) "for service" retirement for those who have served for twenty years and who do not elect to retire with disability benefits. Code at §§13-246, 13-247, 13-349, 13-350. Only "for service" retirees are eligible for VSF benefits. Code at §§ 13-268, 13-278, 13-282, 13-292. In addition, only retirees who retired after various VSF-eligibility dates (that differ among the VSFs) may receive VSF benefits.

In recent years, the VSFs have been steadily increasing in value, thereby increasing the relative amount of total payments received by "for service" retirees as compared with retirees under disability plans and retirees who retired before the applicable VSF-eligibility effective dates. Appellants now assert an entitlement, under federal and New York statutes and the United States Constitution, to a piece of the growing VSF pie. The following are the material facts unique to the separate appellant

groups.

A. CASTELLANO v. CITY OF NEW YORK (No. 96-7920)

The factual background in this case in extensively set forth in Castellano v. Board of Trustees of the Police Officers' Variable Supplements Fund, 937 F.2d 752 (2d Cir. 1991), and Castellano v. City of New York, 946 F. Supp. 249 (S.D.N.Y. 1996). The Castellano appellants are approximately 2,000 disabled retired New York City police officers who receive benefits from the New York City Police Pension Fund, but who retired with "ordinary" or "accident disability" and are therefore ineligible to receive VSF benefits. Only "for service" retirees who retired on or after October 1, 1968 are eligible to receive VSF benefits. Code at §§ 13-268 (5), 13-278(5).

Appellants fall into two broad groups: disabled retirees who did not satisfy the twenty-year service requirement for receiving VSF benefits ("Class I retirees"); and retirees who served for twenty years but whose voluntary election to retire with disability precluded them from receiving additional "for service" VSF benefits ("Class II retirees"). Although it is undisputed that the Castellano appellants are receiving the retirement benefits to which they are entitled by the Code, they

assert two principal federal claims to an entitlement to the VSF benefits; first, that the exclusion of both Class I and Class II retirees from VSF-benefit eligibility constitutes discrimination on the basis of disability in violation of Titles I and II of the ADA and section 504 of the Rehabilitation Act; and second, that the statutory limitation of VSF payments to those who retired on or after October 1, 1968 violates the ADEA. In dismissing appellants' complaint, pursuant to Fed R. Civ. P. 12 (b)(6), the district court rejected these claims. The Castellano appellants also assert various New York State law claims over which the district court decline to exercise supplemental jurisdiction. See id.

B. GRABOSKI APPELLANTS (NO. 96-9257)

The factual background in this case is extensively set out in Graboski v. Giuliani, 937 F. Supp 258 (S.D.N.Y. 1996). The Graboski appellants are disabled retired New York City firefighters and fire officers who are not eligible to receive VSF benefits from the New York City Fire Department Pension Fund. The firefighter and fire officer VSFs originated in CBAs adopted on October 1, 1968 and June 2, 1970 between the Uniformed Firefighters' Association ("UFA") and Uniformed Fired Officers'

Association ("UFOA") and New York City. In 1970, these CBAs were implemented into law. See Act of May 18, 1970, 1970 N.Y. Laws ch 877, §§ B19-43.0, B19-63.0. The legislature has since made further changes to the statutory scheme, including limiting VSF payments to those who retired on or after October 1, 1968, See e.g. Act of July 26, 1993, 1993 N.Y. Laws ch. 480; Code at §13, 392 (6)

The Graboski appellants compose three groups: Class I retirees-retirees with "ordinary" or "accidental" disability pensions who served less that twenty years, Class II retirees-retirees with twenty years of service who elected to retire with disability retirement, and retirees ineligible for VSF benefits because they retired before October 1, 1968. The Graboski appellants assert three principle federal claims: first, that the exclusion of both Class I and Class II retirees from VSF-benefit eligibility discriminates against them on the basis of disability in violation of Titles I and II of the ADA and section 504 of the Rehabilitation Act, second that the statuary limitation of VSF payments to those who retired on or after October 1, 1968 violated the ADEA; and finally, that under the CBAs disability retirees were contractually intended to be VSF beneficiaries and that various later amending legislation restricting VSF-benefit eligibility violates the Contract

and Equal Protection Clauses of the United States Constitution. In dismissing appellants' complaint, pursuant to Fed. R. Civ. P. 12 (b)(6), the district court rejected these claims. See Graboski v. Giuliani, 937 F. Supp. 258, 270 (S.D.N.Y. 1996). The Graboski appellants also assert various New York State law claims over which the district court declined to exercise supplemental jurisdiction. See id.

C. ADORNETTI APPELLANTS (No. 96-9289)

The factual background in this case is set out in Adornetti v. New York City Employees Retirement Sys., No 95-cv-3842, 1996 WL 518097, at *1 (E.D.N.Y. August 28,1 996). Appellants are approximately 800 former New York City Transit Police officers who are ineligible to receive benefits from the transit police officers' VSF. See generally, Code at §13-191 to §13-193.5. (Code provisions relating to transit police officers' VSF)

The transit police officers' VSF, according to the Adornetti appellants, originated in CBA adopted in 1968 between the Patrolman's Benevolent Association ("PBA") and New York City. Although that CBA by its terms did not apply to transit police officers (but rater to members of another police pension fund), appellants claim a contractual entitlement to

whatever benefits the CBA conferred, pursuant to § 13-157(j)(2) of the code. In 1987, the transit police officers' VSF, explicitly limiting VSF-benefit eligibility to "for service" retirees, was implemented into law. See Act of Aug. 10, 1987 N.Y. Laws ch 844. The transit police VSF-eligible effective date is July 1, 987. See Code at §13, 191 (1) (c).

The Adornetti appellants fall into three groups: Class I retirees - disabled retirees who served less than twenty years, Class II retirees - disabled retirees with twenty years of service who elected to retire with disability retirement, and retirees ineligible to receive VSF benefits because they retired before July 1, 1987. Before the district court, the Adornetti appellants claimed entitlement to VSF benefits under Title I of the ADA, section 504 of the Rehabilitation Act, the Contract, Equal Protection, and Takings Clauses of the United States Constitution, and under various New York stat law causes of action. In dismissing the Adornetti appellants' complaint pursuant to Fed. R. Civ. P. 12 (b) (6), the district court adopted the reasoning of the district court in Castellano v. City, 946 F. Supp at 249, rejected appellants' federal claims, and declined to exercise supplemental jurisdiction over their New York claims. See Adornetti, 1996WL 518097, at *1-2. Before this court, appellants

asser only the ADA, Rehabilitation Act, Contract Clause, and New York state law claims.

D. THE CLIFFORD APPELLANTS (No. 96-9601)

The Clifford appellants are six former New York City police officers who are ineligible to receive VSF benefits either because they have not completed twenty years of service (Class I retirees) or because they retired with disability after twenty years of service (Class II retirees). Because their claim under Title I of the ADA is identical to that of the Castellano appellants, Judge Stein adopted the reasoning of his opinion in Castellano v. City of New York, 946 F. Supp. At 249, in dismissing, pursuant to Fed. R. Civ. P. 12 (b) (6), the Clifford appellants' ADA claim. See Clifford v. New York City Police Pension Fund, No. 96-cv-6806 (S.D.N.Y. Mar 6, 1997).

E. VELARDI CASE (No. 96-9237

Velardi alleges that he served twenty years as a firefighter and that the New York City Fire Department ("NYFD") Pension Fund discriminated among twenty-year retirees on the basis of disability, denying "additional [VSF] benefit[s]" only to himself and other disabled firefighter retirees in violation of Title I of the

ADA. Record on Appeal ("ROA") No. 96-9237, doc. 1 at 5. After Velardi moved for summary judgment, NYFD moved to dismiss Velardi's complaint under Rule 12 (b)(6), claiming (I) that Velardi was not a "qualified individual with a disability" within Title I because he could no longer perform the essential functions of his former employment, and (ii) that the VSF scheme discriminates not on the basis of disability, but on the basis of years served. Although Velardi claimed that he did not apply for "for service" retirement because it was never offered to him and he was unaware of the option, see ROA No 96-9237, doc 46 at 35, Judge Kaplan consolidated Velardi's case with the Graboski case and, finding Velardi on "equal footing" with the Graboski appellants, Graboski, 937 F. Supp. At 268, granted NYFD's Fed. R. Civ. P. 12(b)(6) motion to dismiss Velardi's complaint. Velardi now appeals.

DISCUSSION

I. Standard of Review.

This court reviews de novo a district court's dismissal of a complaint for failure to state a claim under Fed. R. Civ. P. 12 (b)(6), see Bernheim v. Litt, 79 F. 3d 318, 321 (2d Cit 1996), and will affirm such a dismissal only where "it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief: Cohen v. Koenig, 25 F.2d 1168, 1172 (2d Cir. 1994) (internal quotation marks and citation omitted). We must take "as true the facts alleged in the complaint and draw[] all reasonable inferences in the plaintiff's favor." Jackson Nat'l Life Ins. Co. V. Merrill Lynch & Co., 32 F.3d 697, 699-700 (2d Cir. 1994)

II. The ADA and Rehabilitation Act Claims: "Qualified Individuals" under Title I.

All appellants in these actions allege federal disability claims pursuant to Title I of the ADA and, with the exception of the Clifford appellants and Velardi, all allege claims under Title II of the ADA and section 504 of the Rehabilitation Act.

The district courts in the cases before us are divided over whether appellants, all of whom are former city employees and most of whom who can no longer perform the "essential functions" of their former employment, are "qualified individual[s] with a disability" within Title I of the ADA for the purpose of challenging alleged discrimination in employer-related fringe benefits. See Castellano v. City of New York, 946 F. Supp. At 252-53; Graboski, 937 F. Supp. At 266. Title I prohibits an employer or

labor organization from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment," 42 U.S.C. §12112(a), including the provision of fringe benefits. See 42 U.S.C. §12112 (b)(2). "Qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111 (8)

In Castellano v. City, the district court determined that disabled retirees, who no longer "hold[]" "employment position[s]" and who can no longer "with or without reasonable accommodation perform the essential functions: of their former employment, do not fall within the plain language of the ADA. 946 F. Supp at 252-53 (citing 42 U.S.C. §12111(8)). Appellees urge us to endorse this approach, which has been adopted by three circuits in the context of challenges to alleged discrimination in the provision of fringe benefits. See Gonzales v. Garner Food Servs., Inc. 89 F 2d 1523, 1526-28 (11th Cir. 1996), cert. denied, 117 S. Ct. 1822 (1997); EEOC v. CNA Ins. Cos., 96 F 3d 1039, 1042-45 (7th Cir. 1996); Parker

v. Metropolitan Life Ins. Co., 99 F. 3d 181, 185-87 (6th Cir. 1996); aff'd, 121 F. 3d 1006 (6th Cir. 1997), cert. denied, 1998 WL 15861 (1998). Title I of the ADA, however, expressly prohibits discrimination in the provision of fringe benefits, see 42 U.S.C. §12112 (b)(2), and certain fringe benefits such as pensions and VSF benefits are provided only post-employment and are meaningful only in that context. This led the district court in Graboski to conclude that it would be illogical for the ADA to exclude the period following employment just "when the employment benefits are to be reaped." Graboski, 937 F. Supp at 266.

In interpreting a statute, we first consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co. 117 S.Ct. 843, 846 (1997). Where the language is ambiguous, we focus upon the "broader context" and "primary purpose" of the statute. Id. At 848. Section 12111 (8) defines a "qualified individual with a disability" as an individual "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."" 42 U.S.C. § 12111(8). It fails to specify when a potential plaintiff must have been a "qualified individual with a disability" in the context of a claim that the

provision of retirement or fringe benefits is discriminatory. The House committee report accompanying the ADA adds that a "determination of whether a person is qualified should be made at the time of the [discriminatory] employment action, e.g. hiring or promotion, and should not be based on the possibility that the employee or applicant will become incapacitated and unqualified in the future," H.R. Rep No 101-485 (III) at 34 (1990) reprinted in 1990 U.S.C.C.A.N. 456, and in doing so, focuses on the situation where the inability to perform essential functions may not have arisen at the time of the discriminatory employment action.

The cases sub judice, however, involve employment actions taken not only after the plaintiffs were no longer employees but after many of the plaintiffs were no longer employees but after many of the plaintiffs had lost the ability to perform the essential functions of their former employment. A literal reading of the committee report suggests that "at the time of the employment action" refers to the actual moment when the employer performs the discriminatory act, in this case, withholds or provides unequal fringe benefits. Such a reading, however, would permit employers to discriminate freely against disabled retirees who had been "qualified individuals" up to the point of retirement, but who (i) no longer held employment positions, and/or (ii) were no

longer able to perform the essential funtions of their former employment due to infirmity. Under reading (i), for example, an employer could terminate an employee in violation of the ADA and then deny him fringe benefits, yet the employee could bring no ADA claim for the latter violation because at the time of the discriminatory denial of fringe benefits he was a former employee who did not "hold" an "employment position." The first reading would also permit an employer to deny post-employment fringe benefits on the basis of disability to any retiree the day after (but not the day before) his retirement. Reading (ii) would permit irrational discrimination as between disabled retirees, some of whom (for whatever reason) could still perform the essential functions of their former employment and others of whom could not. This analysis only underscores the difficulty of defining any temproally discrete, discriminatory "employment action" in the context of the provision of fringe benefits. The fact is that many fringe benefits are earned during years of service before the employment has terminated but are provided in years after the employment relationship has ended.

Looking beyond this inconclusive and unsatisfactory legislative history, we turn to the purpose underlying inclusion of the "essential functions" requirement within the definition of "qualified

individual with a disability." Congress has stated its purpose to be "to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in question." H.R. Rep. No. 101-485 (II) at 55 1990, reprinted in 1990 U.S.C.C.A.N. 337; S. Rep No 101-116 reprinted in Arnold & Porter Legislative History P.L. 101-336, Ameircans with Disabilities Act of 1989, at 26 (1989). Congress used the phrase"qualified individual with a disability" to "reaffirm that [the ADA] does not undermine an employer's ability to choose and maintain qualified workers," id. H.R. Rep No 101-485 (II) at 55 (1990), reprinted in 1990 U.S.C.C.A.N. 337, and to allow employers to "select the most qualified applicant available" rather than be obliged to "prefer applicants with disabilities over other applicants on the basis of disability." H.R. Rep No 101-485 (II), at 56 (1990, reprinted in 1990 U.S.C.C.A.N. 338; S. Rep No. 101-116, reprinted in Arnold & Porter Legislative History P.L. 101-336, Americans with Disabilities Act of 1989, at 27-27 (1989) Congress was concerned that employers not be forced to hire, promote, or retain unqualified, disabled employees.

Where the alleged discrimination relates to the provision of post-employment benefits, rather than to

hiring, promotion, or firing, Congress's expressed concern about qualifications is no longer implicated. Because retired employees who receive fringe benefits no longer work or seek to work for their former employers, they plainly need not perform the essential functions, or indeed any functions, of their former employment. Provided that retired employees were qualified (i.e. performed the "essential functions" requirement has been met. In the instant case, appellants who performed the "essential functions" of their former employment for a period of twenty years and who selected a "for service" retirement plan would be entitled under the ADA to non-discriminatory treatment in the provision of VSF benefits. Because fringe benefits are earned for actual services in employemnt, it is irrelevant whether former employees, otherwise eligible for fringe benefits, could also perform such essential functions at or after termination of their employment.

We note that the Seventh Circuit distinguished post employment benefits claims from title VII antiretaliation claims (where concededly former employees had standing) on the ground that the "protected interest of the former employee[in not facing post-employment retaliation] arose during the period of employment: only in the latter case. CNA, 96 F. 3d at 1045. It is plain to us, however, than an employee's entitlement to

post-employment fringe benefits arises (as much or more so than does his interest in not facing post-employment retailiation) during his period of employment.

An interpretation that would prevent former employees who are no longer "qualified individuals" from bringing claims of discrimination in the provision of post-employement fringe benefits would also undermine the plain purpose of sections 12112(a) and (b)(2): to provide comprehensive protection from discrimination in the provision of fringe benefits. See 42 U.S.C. §§12112 (a) (b)(2). Many fringe benefits are paid out to those who no longer work and who are no longer able to work, and some fringe benefits are paid out to individuals precisely because they can no longer work. Under appellees reading, none of these individuals would be protected by the ADA. Appellees' reading would also undermine the ADA's broad remedial purpose to prohibit disability discrimination in all aspects of the employemnt relationship, leaving disabled retirees unprotected from discrimination in the provision of pensions, health and life insurance, and other post-employment benefits. See 42 U.S.C. §§12101 (a), (b)(1) ("It is the purpose of this chapter--to provide a clear and comprenhensive national mandate for the elimination of discrimination against individuals with disabilities.")

Support for our conclusion can be

found in the Supreme Court's recent decision in Robinson, 117 S. Ct. At 843. Robinson was handed down in 1997 after the district court decisions in Castellano and Graboski and the decisions by the Sixth, Seventh, and Eleventh Circuits in Parker, CNA, and Gonzalez. The Supreme Court held, consistent with Title VII's text and broad remedial purpose, that section 704(a) of Title VII, 42 U.S.C. §2000 e-3(a) -- an antiretaliation provision which prohibits an employer from discriminating "against any of his employees or applicants for employment: -- protects former employees as well, even though "former" employees are nowhere mentioned in that section Id. At 849. Notably, with an exception not applicable here, the definition of "employee" under the ADA parallels that under Title VII and was intended to be given the "same meaning" 29 C.F.R. pt. 1630, App at 349 (1997) (commenting on 29 CFR 1630 pt.2(a)-(f)); see also H.R. Rep No. 101-485(II), at 54, 76, 149 reprinted in 1990 U.S.C.C.A.N. 336, 359, 432 (Title I incorporates by reference Title VII's definition of "employee"); 42 U.S.C. §12111 (4); 42 U.S.C. §2000e(f).

The Court in Robinson first determined "by reference to the language itself, the specific context of the statute as a whole" that the language of section 704(a) of Title VII is ambiguous and then interpreted the Statutory language in light of the purposes of

Section 704(a) and Title VII. Robinson, 117 S. Ct. At 846. The Court concluded that a crabbed interpretation excluding "former employees: from the protections of the Title VII antiretaliation provisions would have undermined their "primary purpose . . .: [m]aintaining unfettered access to statutory remedial mechanisms.' Id. At 848. This reasoning applies with equal force to the instant case. An interpretation excluding from the ADA former employees or employees who can no longer perform the essential functions of their former employment would undermine the purpose of preventing diability discrimination in the provision of fringe benefits. See also Brown v. New York State Teachers' Retirement Sys., 834 F.2d 299, 300 (2d Cir. 1987) (Title VII challenge by two retired women teachers to pension and annuity benefits determied by sex-distinct mortality tables); Pantchenko v. C. B. Dolge Co., 581 F.2d 1052, 1054-55 (2d Cir. 1978) (construing "employee" in Title VII to include former employees in light of statute's purpose "to furnish a remedy against an employer's use of discrimination in connection with a prospective, present or past employment relationship to cause harm to another."); EEOC v. J.M. Huer Cor., 927 F.2d 1322, 1331 (5th Cir. 1991) ("'[t]here is no ground for affording any less protection [against retaliation] to defendant's former employees than to its present

employees' under Title VII.") (quoting Rutherford v. American Ban of Commerce, 565 F. 2d 1162, 1166 (10th Cir. 1997).

We note that the EEOC has, in the context of finge benefits, taken the position that qualified individual [s]" include former employees who can no longer perform the "essential functions" of their former employement. See Amicus Curiae Brief for the EEOC, Castellano v. City of New York, No. 96-7920. As evidenced by the ADA's language and legislative history, it is inconveivable to us that Congress would in the same breath expressly prohibit discrimination in finge benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be "qualified" at or after their retirement, although they had earned those fringe benefits through years of service in which they performed the essential functions of their employement.

The narrow interpretation sought by appellees in the instant actions would permit employers to deny VSF benefits on the basis of disability to retirees with twenty years of service who elected to retire "for service," either the day after their retirement or in any event as soon as they could no longer perform the "essential functions" of their former employment. In light of the textual ambiguity surrounding the time at which a plaintiff must have been a "qualified

individual," the purpose of the "essential functions" requirement, the illogic inherent in a statutory prohibition of discrimination in the provision of fringe benefits that would exclude a large body of retirees from coverage, and the ADA's broad remedial purpose, we hold that a former employee with a disability who "with or without reasonable accommodation" could "perform the essential functions of the employment position" for a period sufficient to establish entitlement to an employer-related fringe benefit (i.e., who is otherwise entitled to receive a fringe benefit) is a "qualified individual with a disability" within Title I of the ADA for the purpose of challenging alleged discrimination in the provision of that fringe benefit.

Because the claims of all appellants allegeing violation of section 504 of the Rehabilitation Act and Title II of the ADA can easily be disposed of on the merits, we assume without deciding that these appellants are also "qualified individuals" within the meaning of those provisions.

III. The ADA and Rehabilitation Act Claims: "Because of Disability"

Having determined that all off the appellants have met the threshold "qualified individual" requirement with respect to their Title I ADA challenge, we

turn to the question of whether the VSF statutory scheme discriminates on the basis of disability.

A. Retirees With Less Than Twenty Years Of Service (Class I Retirees)

Some of the Castellano, Graboski, Adornetti and Clifford appellants served less than twenty years but nevertheless claim entitlement to the VSF benefits under the ADA and Rehabilitation Act. These Class I retirees assert in substance that the ADA entitles a disabled person who retires after ten, or even two years to receive the same pension as a twenty-year retiree. Title I and II of the ADA and serction 504 of the Rehabilitation Act, however, prohibit discrimination only on the basis of disability. See ADA Title I, 42 U.S.C. § 12132 (prohibiting discrimination against a "qualified individual with a disability . . . by reason of such disability"); Rehabilitation Act § 12132 (prohibiting discrimination against a "qualified individual with a disability . . . by reason of such disability"); Rehabilitation Act §504, 29 U.S.C. § 794 (prohibiting discrimination against an "otherwise qualified individual with a disability . . . solely by reason of her or his disability."

The Class I retirees are similarly situated not with twenty-year "for

service" retirees, but with non-disabled retirees who retire after an equivalent period of service. Because the latter group is not entitled to VSF benefits, there is no unlawful discrimination. As noted by the EEOC, "[w]here an employer offers . . . a service retirement plan, there is no ADA violation as long as the service retirement plan treats persons who are covered by the ADA the same as other employees." EEOC Notice No. 915.002 "Questions and Answers About Disability and Service Retirement Plans Under the ADA," May 11, 1995, at 2. In rejecting and ADA, Title II challeng to the VSF scheme by retired New York City Housing and Transit police Offices, the New York Court of Appeals has also stated:

> Eligibility for the benefits of VSF membership require [sic] a minimum of 20 years accredited service. Such a requirement precludes from benefits only officers with less than 20 years of credited service, not those who retired because of a disability. Consequently, the for service eligibility requirement does not discriminate against or burden disabled individuals in a manner different from or greater than the burdens it places on nondisabled individuals.

Gagliardo v. Dinkins, 674 N.E.2d 298, 304 (1996). This analysis applies to the Class I retirees' Rehabilitation Act claims. See Lyons v. Legal Aid Soc'y, 68 F.2d 1512, 1515 (2d cir. 1995); 29 U.S.C. §794(d) ("The standards used to determine whether [section 504 of the Rehabilitation Act] has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under title I of the [ADA] . . . ."). Because VSF payments are available equally to persons with and without disabilities who retire after twenty years of service, Class I retirees have failed to state a claim of discrimination on the basis of disability under the ADA or the Rehabilitation Act.

Nor, as noted by the EEOC, does the ADA "require that service retirement plans and disability retirement plans provide the same level of benefits, because they are two separate benefits which serve different purposes." EEOC Notice No. 915.002 at 2. The ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have given an equivalent amount of service. Cf. Alexander v. Choate, 469 U.S. 287, 301 (1985).

B. Retirees With Twenty Years of Service Who Retired Under a Disability

Plan (Class II Retirees)

The Class II disabled retirees served for twenty years as police officers, transit police officers, firefighters, or fire officers and elected, under the statutory scheme, to retire under the disability and not the "for service" plan. All of the Class II retirees concede that they chose voluntarily to forego "for service" in favor of disability retirement, but nevertheless argue that they are entitled under the ADA and Rehabilitation Act to "for service" benefits in addition to their disability benefits. We disagree.

Although the ADA is violated where "persons covered by the ADA who qualify for both a service retirement and disability retirement plan are required to take a disability benefit which is less advantageous, "EEOC Notice No. 915.002 at 3, nothing in the ADA requires an employer to provide to disabled employees the VSF benefits of a service plan in addition to freely-chosen disability benefits under a disability plan. See Felde v. City of San Jose, 839 F. Supp. 708, 710 (N.D. Cal. 1994), cf. Choate, 469 U.S. 287, 301 (no discrimination under Rehabilitation Act where state provides equal access to health care for all individuals).

C. Deferred Compensation and the ADA Claim

The Graboski appellants point to an isolated statement in the New York Court of Appeals opinion in Gagliardo for the proposition that the statutory scheme entitles police officers and firefighters to VSF benefits regardless of disability status. In rejecting a claim that the VSF benefits constituted an unconstitutional gift under Article VIII, § 1 of the New York State Constitution, the New York Court of Appeals in Gagliardo,

> The [VSFs] were created through collective bargaining as additional future compensation for services actually rendered by police officers within the bargaining unit during the life of the agreement. In addition, these supplemental benefit payments also serve the important purpose of attracting and retaining qualified candidate-officers and providing an inducement to remain in active police service.

Gagliardo, 674 N.E.2d at 303 (emphasis added). Because VSF payments are not retirement benefits but rather deferred compensation under New York law, appellants argue, the statutory scheme denies this earned but deferred compensation only to disabled employees who are unable to complete twenty years of service. The above statement in

Gagliardo, however, disposed of a claim that the VSFs violated the gift ban of the New York Constitution and did not address an ADA claim. The Court's further characterization of the VSFs as "inducement [s] to remain in active . . . service" undermines appellants' position that the benefits constitute deferred compensation. Id. The fact that the level of VSF benefits does not vary by years served is a further indication that the VSF is not bargained-for compensation for services rendered. In light of Gagliardo's ultimate holding that the VSF program does not violate Title II of the ADA, the above statement taken in context does not support appellants' ADA claim.

D. Velardi's Title I ADA Claim

Velardi is neither a Class I nor Class II retiree. Seen in the light most favorable to Velardi, Velardi's complaint alleges that he served twenty years as a firefighter and that the NYFD Pension Fund discriminated as between twenty-year retirees on the basis of disability, denying "additional [VSF] benefit[s]" only to himself and other disabled firefighter retirees, ROA No. 96-9237, doc. 1 at 5. The NYFD moved to dismiss Velardi's complaint under Fed. R. Civ. P. 12(b)(6), claiming (I) that Velardi was not a "qualified individual with a disability" within Title I because he could no long

perform the essential functions of his former employment, and (ii) that the VSF scheme discriminates only on the basis of years served, not on the basis of disability. The motion to dismiss failed to address Velardi's factual allegation that after twenty years of service he had been forced to retire with disability rather than "for service."

Velardi's response to NYFD's motion again claimed that, unlike Class II retirees, he "was required to retire on an ordinary disability," ROA No. 96-9237, doc. 11 at 5, and that it was "wrong for a disabled person to receive far less benefits than what is given to service retiree with the same time served." ROA No. 96-9237, doc. 10 at ¶20. At oral argument before the district court, Velardi stated that he did not apply for "for service" retirement because it was never offered to him and he was unaware of the option. ROA No. 96-9237, doc. 46 at 35. Judge Kaplan then consolidated Velardi's case with the Graboski case and, finding Velardi on "equal footing" with the Graboski appellants, Graboski, 937 F. Supp. At 268, granted NYFD's Fed. R. Civ. P. 12(b) (6) motion to dismiss Velardi's complaint.

Velardi's complaint alleges a valid cause of action under Title I of the ADA. First, we have now held that Velardi is a "qualified individual with a disability" within Title I of the ADA. Second, unlike

the class II retirees who knew of and freely chose "for service" retirement, Velardi's complaint alleges that the NYFD required him to retire on ordinary disability, even though as a twenty-year retiree he was qualified to receive benefits under the "for service" plan. The ADA is violated where "persons covered by the ADA who qualified both a service retirement an disability retirement plan are required to take a disability benefit which is less advantageous." EEOC Notice No. 915.002 at 3. It is unclear on the record before us whether in fact Velardi was forced by NYFD to forego "for service" benefits, in that the NYFD failed to inform Velardi of the "for service" retirement option. If such a failure occurred, it would be sufficient to establish Velardi of the "for service retirement option. If such a failure occurred, it would be sufficient to establish Velardi's Title I ADA claim. At the pleading state when events are seen in the light most favorable to Velardi, see Jackson, 32 F. 3d at 699-700, we cannot equate Velardi with the Class II Graboski appellants, who chose to retire with disability and who now request " for service" benefits as well. We therefore vacate the judgment of the district court insofar as it dismissed Velardi's complaint pursuant to Fed. R. Civ. P. 12(b)(6)

IV. ADEA

The Castellano and Graboski appellants who retired before October 1, 1968 and are therefore ineligible to receive VSF benefits allege that, in violation of the ADEA, they were denied VSF benefits "solely because [they] retired prior to [the effective date of VSF implementation] and are older than those . . . receiving the privilege." This claim frivolous. First, the Castellano appellants are barred from asserting an ADEA claim because they failed to file an ADEA complaint with the EEOC sixty days before commencement of the civil action in district court, as required by 29 U.S.C. § 626 (d). See Miller v. International Tel. & Tel.Corp., 755 F.2d 20, 23-26 (2d Cir.1985). Second, because the Graboski appellants failed to raise the ADEA issue on appeal, they have abandoned it. See LoSacco v. City of Middletown, 71 F3d 88, 92 (2d Cir. 1995); Fed. R. App. P. 28 (a)(6) (appellant's brief "must contian the contentions of the appellant on the issues presented.")

Finally, even if the Castellano and Graboski appellants' claims were still alive, their factual allegation that they are "older" than other officers receiving VSF benefits, without more is insufficient to state an ADEA claim. See, e.g., Dugan v. Martin Marietta Aerospace, 760 F. 2d 397, 399 (2d Cir. 1985) (stating basic

elements of ADEA prima facie case). Just as at the ADEA does not mandate that "any improvements to a pension plan [be applied] retroactively to any active employees for past services," United Indep. Flight Officers, Inc. v. United Airlines, Inc., 572 F. Supp. 1494, 1506 (N.D. Ill. 1983), aff'd, 756 F.2d 1274 (7th Cir. 1985), the ADEA plainly does not require that any improvements in retirement benefits be applied retroactively to past employees who retired under different terms.

V. Contract Clause Claim

Various appellants claim that, by denying them VSF benefits, various appelles have impaired their rights under the Contract Clause, Article I, Section 10 of the Constitution.

A. Adornetti Appellants' Claim

The Adornetti appellants claim that the VSF implementing legislation, 1987 N.Y. Laws ch. 844, limiting VSF-benefit eligibility to "for service" retirees, impaired their contractual rights to VSF benefits created in a 1968 collective bargaining agreement ("CBA") between the Patrolman's Benevolent Association and New York City. That CBA states: "The purpose of the [VSF] shall be to provide a supplemental benefit on a variable annuity

basis, for Articles I and II, as determined by the trustees," Castellano v. Board, 937 F.2d at 754. Although that CBA by its terms did not apply to transit police officers (but rather to members of another police pension fund), appellants claim entitlement to the contractual rights to the VSF benefits that the CBA allegedly conferred, pusuant to § 13-157(j)(2) of the Code, which provides:

> [E]ach transit police member shall have an shall be entitled and subject to the same rights, benefits, privileges, and obligations as a member of the police force of the city who is a member of the police pension fund maintained pursuant to subchapter two of chapter two of this title, with respect to the matter provided for in [sixteen listed sections of the Code].

We express no opinion as to whether or not § 13-157(j) (2) confers upon transit police officers the benefits bestowed by the PBA's CBA, because we easily hold that, even if it did, the PBA's CBA creates no contractual entitlement ot VSF benefits. Ar. I § 10 of the Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Where there is no contractual relationship, however, there can be no impairement. See General Motors Corp v. Romein, 503 U.S. 181, 186

(1992). This court has previously rejected a Contract Clause claim brought by police retirees based upon the same CBA, holding that the CBA plainly did not create any contractual obligation, but only established a general fund the beneficiaries of which were to be determined later by the legislature. See Castellano v. Board, 937 F.2d at 757. For the reasons stated in Castellano v. Board, we reject the Adornetti appellants' Contract Clause claim.

B. Graboski Appellants' Claim

The Graboski appellants claim that their VSF implementing legislation, 1970 N.Y. Laws chs. 876-877, restricting eleigibility for VSF benefits to "for service" retirees, impaired their contractual right to VSF payments created in their original CBAs between New York City and the UFA and UFOA. The UFA's and UFOA' CBA clauses allegedly creating this contractual right state: "The purpose of [the VSF] shall be to provide a supplemental benefit on a variable annuity basis for Article I and IB ["fire officer[s]" or "firemen,"] as determined by the trustees." UFA CBA, Article VII, Section6; UFOA CBA, Article X, Section 6.

Because this language is virtually identical to the language in the CBA that we held in Castellano v. Board did not create contractual rights to VSF benefits, we reject this Contract Clause claim as well. See Castellano v. Board, 927 F.2d

at 757.

The Graboski appellants next contend that the original VSF implementing legislation, 1970 N.Y.Laws chs. 876-877, itself created contractual rights in the VSF payments impaired by later amending legislation. For example, the original 1970 legislation defined the permissible class of VSF benefciaries as, among others, "[a]ny person who recevies a retirement allowance by reason of having retired from service . . . . " 1970 N.Y.Laws ch. 877 at §§ B198-40.00 subd. 5, GB19-60.0 subd. 6. Ind 1972, the legislature amended "from service" to "for service," explicitly characterizing the amendment as a correction of a typographical error. See 1972 N.Y.Laws chs. S101, 1012. This amending legislation, appellants contend, impaired the contratual rights of non-"for service" retiree to VSF benfits. We disagree.

The New York Court of Appeals rejected a similar challenge by police officer retirees, holding definitively that the original 1970 VSF-implementing legislation created no contractual obligation to disburse VSF payments under New York law. See Ballentine v. Koch, 674 N.E.2d 292, 297-98 (N.Y.1996). According to that court, the statutory scheme for payments of VSF benefits is "highly conditional and discretionary"; no retiree could be "assured that funds for supplemental payments, if made, would be

available of a certain amount or continue of any specified duration"' and "the statute itself expressly stipulated that it did not create any contractual rights as to the [VSF] payments." Id.; See Code at §13-271(b) (2) (i) (Police Officers' VSF: "The legislature hereby declares that [the VSFs] shall not create or constitute membership in a pension . . . system and shall not create or constitute a contract with any pension fund beneficiary . . ."') (emphasis aded); id. At §13-385(b) (2) (I) (same for firefighters' VSF); id. At § 13-395(b)(2)(i) (same for fire officers' VSF). Because, under the 1970 implementing legislation, firefighters and fire officers are no more entitled to VSF benefits than were the police officers in Ballentine, any amending legislation affecting these appellants' VSF benefits--whether substantive or typogrphical--could not constitute an "impairment" in violationof the Contract Clause. See General Motors, 503 U.S. at 186.

VI. Other Constitutional Claims

The Graboski appellants claim that the statutory scheme's failure to provide payments to non-" for service" retirees violates the Equal Protection Clause of the Fourteenth Amendment. In our previous decision of Castellano v. Board, we easily disposed of this claim. See Castellano v. Board, 937 F.2d at 755-57. The statutory scheme bears a rational relationship to a

government interest. As we held in Castellano, "[I]n allowing VSF payments only to 'for service' retirees, the city struck a balance between 'for service and other retirees" in order to "serve[] the legitimate governmental interest of discouraging experienced members of the police force from seeking early retirement." Id. At 756.

The Castellano appellants contend further that the district court's failure to grant discovery before dismissing their complaint pusuant to Fed. R. Civ. P. 12(b)(6) violates their "right to petition for redress of grievances under the First and Protection of laws under the Fifth Amendment to the United States Constitution." Castellano's Br. 15 8-9. This claim, unsuppported by authority, must be rejected as frivolous. See Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 699-700 (2d Cir. 1994) (district courts consider only allegations in complaint in deciding 12(b)(6) motions); M.B. #11072-054 v. Reish, 119 F.3d 230, 232 (2d Cir. 1997) (district court's discovery rulings "reversed only upon a clear showing of an abuse of discretion.") (internal quotation marks omitted).

VII. State Law Claims

The Castellano, Graboski, and Adornetti appellants advance various New York state law claims in addition to their federal claims. These include asserted

violations of several provisions of the New York Constitution, breach of the duty of fair representation under New York Civil Service Law §2200 et seq., unjust enrichment, quantum meruit, and violation of New York public policy againsts forfeiture of earned wages. In light of the district courts' proper dismissals of the federal claims of all of these appellants, save Velardi, those courts did not abuse their discretion in declining to exercise supplemental jurisdiction over the state claims. See 28 U.S.C. §1367 (c)(3) see also Castellano v. Board, 937 F.2d at 758-59 (affirming district court's dismissal of pendent state constitutional claims in light of dismissal of all federal constitutional claims).

We have carefully considered all of the appellants' remaining arguments and find them to be without merit. In addition, various appellees have raised a number of defenses including statutes of limitations, lack of personal involvement, 42, U.S.C. § 1983, the New York Constitution, and other state common law and statutory grounds. No appellee has raised any such defense in the Velardi case. In light of our disposition of these appeals, we need not consider these defenses.

Conclusion

The judgment dismissing the claim of Velardi v. New York City Pension Fund (No. 96-9237) is vacated and remanded for further proceedings and the parties shall pay their own costs for this appeal. All of the other judgments on appeal are affirmed. (Nos. 96-7920, 96-9257, 96-9289, 96-9601, 96-9004).

946 F. Supp. 249
249 (USDC, S.D.N.Y.
June 28, 1996.)

Peter CASTELLANO, et al.,
Plaintiffs,

v.

The CITY OF NEW YORK, et al.,
Defendants.

No. 95 Civ. 5014 (SHS).

STEIN, District Judge.

Plaintiffs also assert claims pursuant to the Age Discrimination in Employment Act ("ADEA"), see 29 U.S.C. § 621 et seq., and various state laws. Defendants are numerous individuals and entities, who allegedly are responsible for creating, implementing or administering the New York City Police Department benefit programs.

Currently before the Court are motions by defendants to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Because plaintiffs are not protected parties and seek preferential treatment rather than nondiscriminatory treatment, plaintiffs' ADA and Rehabilitation Act claims should be dismissed. Because plaintiffs have failed to file a complaint with the Equal Employment Opportunity Commission, their ADEA claims should be dismissed. Last,

because this Court in its discretion declines to exercise supplemental jurisdiction over the plaintiffs' state law allegations, those claims should also be dismissed.

I. BACKGROUND

For purposes of this motion, the factual allegations in the complaint are assumed to be true. See, e.g., Annis v. County of Westchester, N.Y., 36 F.3d 251, 253 (2d Cir.1994). Plaintiffs are all disability retirees who receive benefits from the New York City Police Pension Fund and are not eligible to receive certain additional benefits known as "Variable Supplements." Pursuant to the New York City Administrative Code, a police officer may retire with benefits for a number of reasons; the reason for the retirement will affect the amount of benefits the retiree will receive. See generally Castellano v. Board of Trustees of the Police Officers' Variable Supplements Fund, 937 F.2d 752, 753 (2d Cir.), cert. denied, 502 U.S. 941, 112 S.Ct. 378, 116 L.Ed.2d 329 (1991).

These actions involve three types of retirements: (1) "ordinary disability" retirement; (2) "accident disability" retirement; and (3) "for service" retirement. "Ordinary disability" retirement is available for an officer who

is "physically or mentally incapacitated for the performance of duty and ought to be retired." N.Y.C.Admin.Code § 13-251. "Accident disability" retirement is available for an officer who is physically or mentally incapacitated and that incapacitation is "a natural and proximate result" of police duties. Id. at § 13-252. "For service" retirement is available for officers who retire after serving twenty years on the force. Id. at § 13-246. See also Castellano, 937 F.2d at 753.

Plaintiffs all retired with either an "ordinary disability" or an "accident disability." (Complaint, ¶ 2.) Plaintiffs are therefore ineligible to receive what are known as Variable Supplements, which are payments from either the Police Officer's Variable Supplements Fund or the Police Superior Officers' Variable Supplements Fund (collectively, the "Variable Supplements Funds"). See N.Y.C.Admin.Code §§ 13-268, 13-278. The Variable Supplements Funds are funded from the investment earnings of the Police Pension Fund. Any excess earnings in the Police Pension Fund in a given year--calculated as the actual earnings of equity investments less (1) the hypothetical earnings that would have been realized if the equities had instead been invested in fixed income investments and (2) prior year offsets--are transferred from the Police Pension Fund to the

Variable Supplements Funds. See N.Y.C.Admin.Code § 13- 232. These Variable Supplements are paid in addition to all other benefits already being received by the retiree, but are paid only to "for service" retirees. N.Y.C.Admin.Code § 13-268(5). They are not paid to "ordinary disability" or "accident disability" retirees.

Plaintiffs claim that the exclusion of "ordinary disability" and "accident disability" retirees from participating in the payments from the Variable Supplements Funds violates the ADA, the Rehabilitation Act, the ADEA and various state law protections. For the reasons that follow, defendants' motions to dismiss the complaint are granted.

II. DISCUSSION

In reviewing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a district court's role is to assess the legal feasibility of the complaint; it is not to weigh the evidence which might be offered at trial. See Festa v. Local 3, Int'l Bhd. of Elec. Workers, 905 F.2d 35, 37 (2d Cir.1990); Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir.1980); Odom v. Columbia Univ., 906 F.Supp. 188, 193 (S.D.N.Y.1995). In considering the legal feasibility of the complaint, a court may only consider "the facts alleged in the pleadings, documents attached as exhibits

or incorporated by reference and matters of which judicial notice may be taken." Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir.1993); Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir.1993). All factual allegations in the complaint must be accepted as true and the complaint must be viewed in the light most favorable to the plaintiff. See LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir.1991); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1099 (2d Cir.1988), cert. denied, 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989). A motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir.1995) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)); Walker v. City of N.Y., 974 F.2d 293, 298 (2d Cir.1992) (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir.1991)).

A. ADA and Rehabilitation Act Claims

Plaintiffs allege federal disability discrimination claims pursuant to Title I and Title II of the ADA and section 504 of the Rehabilitation Act. Although each statute provides distinct causes of action, there is significant overlap

between them. See Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1515 (2d Cir.1995) (citing Staron, 51 F.3d at 355-56); Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir.1995); Collings v. Longview Fibre Co., 63 F.3d 828, 832 n. 3 (9th Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 711, 133 L.Ed.2d 666 (1996); Pottgen v. Missouri State High Sch. Activities Assoc., 40 F.3d 926, 930 (8th Cir.1994). Title I of the ADA prohibits discrimination by a "covered entity" against a "qualified individual with a disability because of the disability" in all of the terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a); 29 C.F.R. pt. 1630. Title II of the ADA prohibits a "public entity" from discriminating against "a qualified individual with a disability" because of the disability in "the benefits or the services, programs, or activities" of the public entity. 42 U.S.C. § 12132; 28 C.F.R. pt. 35. Section 504 of the Rehabilitation Act prohibits discrimination by recipients of federal funds against a "qualified individual with a disability" because of the disability "under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

Under each of those statutes, in order to state a claim, a plaintiff must allege sufficient facts to show that he or she is a qualified individual with a disability.

See, e.g., Flight v. Gloeckler, 68 F.3d 61, 63-64 (2d Cir.1995). Title I of the ADA defines such a person as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Rehabilitation Act's definition in the employment context is essentially the same. See Lyons, 68 F.3d at 1515 (quoting 45 C.F.R. § 84.3(k)(1) (1994)); cf. 29 C.F.R. § 1614.203(a)(6). The statutory language and the case law indicate that these provisions do not provide protection for all disabled individuals; instead, protection is limited to those persons who are "able to meet all of a program's requirements in spite of [their] handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979); Lyons, 68 F.3d at 1514-15; Guice-Mills v. Derwinski, 967 F.2d 794, 797 (2d Cir.1992); Gilbert v. Frank, 949 F.2d 637, 640-42 (2d Cir.1991).

Thus, although it may seem "undesirable and perhaps unpalatable," Parker v. Metropolitan Life Insur. Co., 875 F.Supp. 1321, 1326 (W.D.Tenn.1995), an individual who is totally disabled--that is, unable to perform the essential job functions

even with reasonable accommodation--is not entitled to relief under these provisions. See Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8th Cir.1987), cert. denied, 485 U.S. 938, 108 S.Ct. 1116, 99 L.Ed.2d 277 (1988); Garcia-Paz v. Swift Textiles, Inc., 873 F.Supp. 547, 554-55 (D.Kan.1995); Lewis v. Zilog, Inc., 908 F.Supp. 931, 945 (N.D.Ga.1995); Reigel v. Kaiser Found. Health Plan of N.C., 859 F.Supp. 963, 967-69 (E.D.N.C.1994); Cadelli v. Fort Smith Sch. Dist., 852 F.Supp. 789, 797 (W.D.Ark.1993), aff'd on other grounds, 23 F.3d 1295 (8th Cir.1994); see also August v. Offices Unlimited, Inc., 981 F.2d 576, 582- 83 (1st Cir.1992) (applying state disability discrimination statute).

Plaintiffs are all physically or mentally incapacitated for the performance of police duties and are receiving disability retirement pensions. No factual issue is raised regarding whether or not plaintiffs can perform the essential functions of a police officer, see Marvello v. Chemical Bank, 923 F.Supp. 487, 491 (S.D.N.Y.1996), and plaintiffs do not assert that they could perform these

functions with any level of accommodation.[1]

Plaintiffs also do not claim that any disability based discrimination occurred before they became totally disabled. See Esfahani v. Medical College of Pa., 919 F.Supp. 832, 835-36 (E.D.Pa.1996). Accordingly, plaintiffs fail to meet the threshold definition of a "qualified individual with a disability" as required Title I of the ADA and the Rehabilitation Act and thus lack standing to pursue this action under these provisions.

In the benefits context, the eligibility requirements differ slightly from those required in the employment context. Under Title II of the ADA, a

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1. In Equal Employment Opportunity Comm'n v. CNA Ins. Cos., No. 95 C 5835, 1996 WL 26879, at *3-5 (N.D.Ill. Jan. 23, 1996), the Equal Employment Opportunity Commission ("EEOC") urged the court to reject prior case law and find that Title I of the ADA requires only that an individual must show that he or she would be qualified for the benefit, absent the disability. The court rejected that argument holding that Title I protects only those persons who can perform the essential functions of the employment position. Id. at *5. Here, however, even if this Court were to adopt the EEOC's argument, plaintiffs would still fail to state a claim because plaintiffs concede that they do not have twenty years of service and hence they would still be ineligible for the Variable Supplements even if they were not disabled.

"qualified individual with a disability" is "an individual with a disability who, with or---without reasonable modifications to rules, policies, or------ practices ... meets the essential eligibility requirements for ... participation in programs or activities provided by a public entity." 42 U.S.C. § 12131. The Rehabilitation Act imposes a similar standard, providing that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be excluded from participation in the benefits of, or subjected to discrimination under any program receiving Federal financial assistance." 29 U.S.C. § 794(a). In order to pursue this type of claim, an individual must show that he or she meets the essential eligibility requirements for the benefit sought. See Sandison v. Michigan High Sch. Athletic Ass'n, Inc., 64 F.3d 1026, 1034 (6th Cir.1995); Pottgen, 40 F.3d at 930-31; Grubbs v. Medical Facilities of Am., Inc., 879 F.Supp. 588, 590 (W.D.Va.1995); Coleman v. Zatechka, 824 F.Supp. 1360, 1368 (D.Neb.1993). A requirement of a program is not, however, considered to be "essential" if a "reasonable ----- accommodation" would enable an individual to qualify for---the benefit. See Pottgen, 40 F.3d at 929; Johnson v.

Florida High Sch. Activities Ass'n, Inc., 899 F.Supp. 579, 584 (M.D.Fla.1995). Accordingly, the "reasonableness" of an accommodation and the "essentialness" of an eligibility requirement are inextricably intertwined and must be---------- examined together.

When reviewing a challenge to the eligibility requirements of a program, a court must first review each eligibility requirement to determine whether or not the requirement is essential--which entails determining whether an accommodation is reasonable--and then must determine whether the individual has met those requirements that are essential. See Pottgen, 40 F.3d at 929; Aughe v. Shalala, 885 F.Supp. 1428, 1431 (W.D.Wash.1995). An eligibility requirement will be essential--or an accommodation of it will be unreasonable--if its alteration "either imposes 'undue financial and administrative burdens' [on the public entity] or requires 'a fundamental alteration in the nature of [the] program.' " Pottgen, 40 F.3d at 931 (alterations in original) (quoting School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 n. 17, 107 S.Ct. 1123, 1131 n. 17, 94 L.Ed.2d 307 (1987)); Easley by

Easley v. Snider, 36 F.3d 297, 305 (3d Cir.1994); Roberts v. KinderCare Learning Ctrs., Inc., 896 F.Supp. 921, 926 (D.Minn.1995). Reasonable accommodations are those that do not require an organization "to lower or to effect substantial modifications of standards to accommodate a handicapped person." Pottgen, 40 F.3d at 930 (quoting Southeastern Community College, 442 U.S. at 413, 99 S.Ct. at 2370-71). Furthermore, even reasonable modifications need be made only if they "are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7).

In this case, plaintiffs' claims fail both because plaintiffs fail to meet an essential eligibility requirement and hence they are not within the protections of the statutes, and because modification of the eligibility requirement is not necessary to avoid discrimination based on a disability. Although questions of the reasonableness of an accommodation or the essentialness of an eligibility requirement generally need a fact-specific inquiry, see Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140 (2d Cir.1995) (addressing reasonableness of accommodations under the Rehabilitation Act); Staron, 51 F.3d at 356 (same under

Title I of ADA), certain eligibility requirements of a program by their nature are essential and any alteration unreasonable as a matter of law. See Pottgen, 40 F.3d at 930- 31; McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 859- 60 (5th Cir.1993), cert. denied, 510 U.S. 1131, 114 S.Ct. 1103, 127 L.Ed.2d 415 (1994); cf. Alexander v. Choate, 469 U.S. 287, 302, 105 S.Ct. 712, 720- 21, 83 L.Ed.2d 661 (1985). But see Pottgen, 40 F.3d at 932-33 (Arnold, C.J., dissenting); Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F.Supp. 663, 668 (D.Conn.1996); Johnson, 899 F.Supp. at 585.

The eligibility requirement in question here is the "for service" retirement requirement to qualify for Variable Supplements. The accommodation sought is a waiver of this requirement for officers who retire with a disability pension. This requirement is a core component of the Variable Supplements Funds and any alteration would change the entire nature of the additional payments which presumably serve as an additional incentive for extended service. See Castellano, 937 F.2d at 756. Accordingly, this Court finds that the "for service" requirement is essential and any

modification would result in a fundamental alteration to the program. See Aughe, 885 F.Supp. at 1432 ("Because that would essentially rewrite the statute, it must be seen as a fundamental alteration in the nature of the program."); McGregor, 3 F.3d at 860. Because plaintiffs admittedly cannot meet the "for service" requirement, they are not qualified individuals entitled to pursue an action under these provisions of the ADA and the Rehabilitation Act.

Furthermore, even if plaintiffs' allegations were sufficient to allege that the waiver sought was a reasonable modification, plaintiffs' allegations would still be insufficient to state a claim under these federal disability discrimination statutes because they fail to allege facts sufficient to show that the modification is necessary to avoid discrimination on the basis of a disability. In order to determine whether a modification is necessary, a court must look to the merits of the claims and determine essentially if plaintiffs' allegations show either that they were treated differently than other similarly situated nondisabled employees or that defendants' policies have a disparate impact on disabled employees. See

Crowder v. Kitagawa, 81 F.3d 1480, 1483-84 (9th Cir.1996) (distinguishing between disability discrimination and denial of or exclusion from benefits because of a disability); P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir.1990); Cramer v. State of Fla., 885 F.Supp. 1545, 1552-53 (M.D.Fla.1995); see also Traynor v. Turnage, 485 U.S. 535, 548, 108 S.Ct. 1372, 1382, 99 L.Ed.2d 618 (1988); Alexander v. Choate, 469 U.S. 287, 309, 105 S.Ct. 712, 724, 83 L.Ed.2d 661 (1985).

In reviewing cases under the federal disability statutes, courts must give "great deference" to guidelines of the EEOC, though those guidelines are not binding. See Blum v. Bacon, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982); Teal v. State of Conn., 645 F.2d 133, 137 n. 6 (2d Cir.1981), aff'd, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982); Helen L. v. DiDario, 46 F.3d 325, 331-32 (3d Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995); Le v. Applied Biosystems, 886 F.Supp. 717, 720 n. 2 (N.D.Cal.1995). The EEOC has issued guidelines stating that "[t]he ADA does not require that service retirement plans and disability retirement plans provide the same level of benefits, because they are two separate benefits

which serve different purposes.... Therefore, the employer does not violate the ADA simply by providing different benefits under service and disability retirement plans." See EEOC Notice, "Questions and Answers About Disability and Service Retirement Plans Under the ADA, No. 915.002, May 15, 1995; see also Felde v. City of San Jose, 839 F.Supp. 708, 710 (N.D.Cal.1994), aff'd, 66 F.3d 335 (9th Cir.1995) (Table).

It is undisputed that plaintiffs could have retired with "for service" pensions and eligibility for the Variable Supplements if they had completed twenty years of employment at the time they retired. The relief plaintiffs seek here--waiver of the "for service" requirement in order to obtain Variable Supplements--is outside the protection of the federal disability discrimination statutes, which seek to protect disabled individuals from being discriminated against because they are disabled "in relation to nonhandicapped individuals." Traynor, 485 U.S. at 548, 108 S.Ct. at 1382; Flight, 68 F.3d at 63-64. This requirement discriminates against--or precludes from benefits--officers with less than twenty years of service, not officers who retired because of a

disability. See Flight, 68 F.3d at 64 ("the distinction in the present case is not based upon [plaintiff's] disability, multiple sclerosis, but rather upon his inability to drive."); Felde, 839 F.Supp. at 711. But see Dennin, 913 F.Supp. at 669-70. It does not burden disabled individuals in a manner different from or greater than the burdens it places on nondisabled individuals. See Traynor, 485 U.S. at 548-50, 108 S.Ct. at 1382-83; Crowder, 81 F.3d at 1484.

Plaintiffs could have argued that the service requirement places a greater burden on the disabled because they do not have the option of continuing to work to meet the twenty year service requirement. This argument, however, does not support the relief sought by plaintiffs because, if this were plaintiffs' argument, they would seek an accommodation that would permit disabled officers to continue working in some capacity in order to have the opportunity to work for twenty years and earn a "for service" retirement and its concomitant entitlement to share in the Variable Supplements. Plaintiffs, however, seek no such relief in this action.

In essence, plaintiffs seek "special

treatment rather than simply nondiscriminatory treatment." Felde, 839 F.Supp. at 711; Lincoln CERCPAC v. Health and Hosps. Corp., 920 F.Supp. 488, 497 (S.D.N.Y.1996); McGregor, 3 F.3d at 860 ("the additional accommodations, if granted, would constitute preferential treatment and go beyond the elimination of disadvantageous treatment"). Assuming they meet the other eligibility requirements, plaintiffs have full access to all retirement benefits offered to nondisabled officers and also have the additional option to selecting one of the disability retirement plans. See Traynor, 485 U.S. at 548-49, 108 S.Ct. at 1382. Defendants' refusal to provide this special treatment to plaintiffs does not violate any of the federal disability statutes and modification of it is not necessary to avoid disability based discrimination. See Alexander, 469 U.S. at 306, 105 S.Ct. at 715; Flight, 68 F.3d at 63- 64; Felde, 839 F.Supp. at 711.

Accordingly, because plaintiffs are not within the class of individuals protected by the federal disability discrimination statutes and because modification of the eligibility requirements is not necessary to avoid disability based discrimination, defendants' motions to dismiss plaintiffs'

claims under the ADA and the Rehabilitation Act are granted, and those claims shall be dismissed.

B. ADEA Claims

Plaintiffs allege that their exclusion from participation in the Variable Supplements violates the ADEA because the exclusion denies benefits "solely because plaintiffs retired prior to passage of the defined benefit component of the [Variable Supplements Funds] and are older than those City Police Officers receiving the privilege." (Complaint, ¶ 105.) Plaintiffs, however, are barred from asserting an ADEA claim because they failed to file a complaint with the EEOC. See Miller v. International Tel. & Tel. Corp., 755 F.2d 20, 23-26 (2d Cir.), cert. denied, 474 U.S. 851, 106 S.Ct. 148, 88 L.Ed.2d 122 (1985); Peterson v. Insurance Co. of N. Am., 884 F.Supp. 107, 109 (S.D.N.Y.1995); Julian v. New York City Transit Auth., 857 F.Supp. 242, 249 (E.D.N.Y.1994), aff'd, 52 F.3d 312 (2d Cir.1995) (Table). Furthermore, even if plaintiffs' ADEA claims were not barred, their factual allegation that they are "older" than other officers is insufficient to state a claim under ADEA. See, e.g., Dugan v. Martin Marietta

Aerospace, 760 F.2d 397, 399-400 (2d Cir.1985); Abbasi v. Herzfeld & Rubin, P.C., 863 F.Supp. 144, 146-47 (S.D.N.Y.1994). Thus, plaintiffs' ADEA claim shall be dismissed as well.

C. State Law Claims

Plaintiffs also assert several state law claims for which jurisdiction is premised on this Court's supplemental jurisdiction. Pursuant to 28 U.S.C. § 1367(c)(3), a court may decline to exercise supplemental jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction." See Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir.1994); Odom, 906 F.Supp. at 197. In considering whether to exercise supplemental jurisdiction, a court should balance the factors of judicial economy, convenience, fairness and comity, which will usually "point toward declining to exercise jurisdiction over the remaining state-law claims" when all the federal law claims are eliminated before trial. Odom, 906 F.Supp. at 197 (citing DiLaura v. Power Auth. of State of N.Y., 982 F.2d 73, 80 (2d Cir.1992)); see also United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); Purgess, 33 F.3d at 138. Such a

balancing here leads this Court to exercise its discretion to decline to exercise supplemental jurisdiction over plaintiffs' state law claims. Accordingly, those claims shall be dismissed.

III. CONCLUSION

Defendants have raised numerous other arguments in support of their motions to dismiss, including arguments based on the relevant statute of limitations, the immunity of certain defendants pursuant to the Eleventh Amendment as well as legislative immunity, a lack of personal involvement and that disability retirement benefits are more favorable than the service retirement benefits. Because of this Court's resolution of defendants' motions to dismiss, it is unnecessary to address those other arguments at this time. For the reasons set forth above, defendants' motions to dismiss the complaint are granted.

United States Court of Appeals for the
Second Circuit
United States Court House
40 Foley Square
New York 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, an the 15th day of April, one thousand nine hundred and ninety-eight.

Castellano, et al.
Plaintiffs-Appellants
Docket No. 96-7920
v
New York City, et al.
Defendants-Appellees,

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants Castellano, et al.,

Upon consideration by the that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the Judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be

taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

BETH J. MEADOR
Administrative Attorney

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT
United States Court House
40 Foley Square
New York, 10007

MANDATE FILED FEB. 24, 1998

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse int he City of New York, Foley Square, on the 24th day of February. one thousand nine hundred and ninety eight.

BEFORE: Hon. James L. Oakes, Hon. John M. Walker, Jr., Hon. Fred L. Parker Circuit Judges

Docket Nos. 96-7920, 96-9004, 96-9257, 96-9289, 96-9601, 96-9237

Peter Castellano, et al.,
Plaintiffs-Appellants

Docket No. 96-7920
96-9004

v

THE CITY OF NEW YORK. ET AL.
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED. and DECREED that the judgments of said district court in docket numbers 967920, 96-9004, 96-9257, 96-9280 and 96-9601 be and they hereby are affirmed, and the judgment of said district court in docket mumber 96-9237 be and it hereby is vacated and remanded to said district court for further proceedings, In accordance with the opinion of this court.

George Lange III, Clerk
Beth J. Meador, Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETER CASTELLANO, et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

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95 Civil 5013 (SHS) and all actions consolidated with it.

JUDGMENT

Defendants, in the above-entitled sixteen (16) consolidated actions, having moved to dismiss the Complaint, and the said motions having come before the Honorable Sidney H. Stein, United States District Judge, and the Court thereafter on June 26, 1996, having rendered its Opinion (76858) granting Defendants' motions to dismiss the Complaint, it is,

ORDERED, ADJUDGED AND DECREED: That Defendants' motions to dismiss the Complaint be and are hereby granted; accordingly, the Complaint is dismissed and the above entitled consolidated actions are removed from the Court's active docket.

Dated: New York, New York
June 28, 1996

JAMES PARRISON

_____

Clerk of the Court

_____

Deputy Clerk

United States Constitution, 14th Amendment.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered

to be a statute of the District of Columbia.

Rehabilitation Act of 1973 Sec. 504; 29 USC Sec. 794

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined For the purposes of this section, the term "program or activity" means all of the

operations of - (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system; (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship - (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers. Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Americans With Disabilities Act. 42 U.S.C. Sec. 12112(a). Sec. 102 Discrimination. (a) General Rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or

discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. Sec. 12131. Sec. 201 Definition. **(2)** Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who with or without reasonable modifications to rules, policies or practices, the removal of archetchtural communication, or transportation brriers, or the provision of auxiliary aids and services meeets the essential eligibility requirements for the receipt of services or participatioon in programs or actifvities provided by a public entity.

42 U.S.C. Sec. 12132. Sec. 202 Discrimination. Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. Sec. 12132. Sec. 203 Enforcement. The remedies, procedures, and rights set forth in Section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures

and rights this title provides to any person alleging discrimnation on the basis of disability in violation of Sec. 202.

New York City Administrative Code Title 13 Sec. 13-252 Retirement for accident disability. Medical examination of a member in city service for accident disabillity and investigation of all statements and certifications by him or her on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time and place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member, and that such member should, therefore, be retired.

Plaintiffs as and for a complaint herein respectfully allege:

JURISDICTION

1. Jurisdiction is founded upon 42 USC 1983,; the Americans with Disabilities Act of 1990, 42 USC Secs. 12111 et seq 12132-34, Titles I, II which prohibits state and local governments from employment discrimination against people with disabilities; The Revenue Sharing Act of 1972 as amended by Public Law 99-272 Title XIV Revenue Sharing, Section (a) (7); the Pension Reform Act, 1974, and the Sec 504 et seq of the Rehabilitation Act of 1973, 29 USC Sec 794, the United States Constitution, First Amendment component of Redress of Grievances, and 29 USC Sec 623 Age Discrimination Act, in that it is alleged that persons acting under color of state right are depriving the plaintiffs of rights protected by federal laws, which deprivation is based upon the plaintiffs' disabilities or the employers' perceptions of disability. This court has jurisdiction under 28 USC 1345, 42 USC 12117 and 28 USC 2201 and 2202. Heretofore, complaints were made by or on behalf of the plaintiffs to the Equal Employment Opportunity Commission, Title I and to the Justice Department under Title II. Right to sue letters issued by the EEOC, copies of which are annexed hereto. This action is commenced within 90 days of the date of

the issuance of the right to sue. The Justice Department is continuing it's inquiry under Title II. Venue is in the Southern District of New York in that the defendant City of New York maintains its principal offices in the Southern District of New York.

PARTIES

2. At all times hereinafter mentioned the plaintiffs were employees of the City of New York as uniformed members of the New York City Police Department, all of whom retired either on ordinary disability or on line of duty disability, and some of whom retired under such circumstances after twenty years of service and others retired under such circumstances prior to twenty years of service, by reason of the disability of the plaintiffs or their employer's perception that the plaintiffs have a physical or mental impairment that substantially limits a major life activity, or that they have or had a history of such disability, and who are or were entitled to efforts on the part of the employer at a rehabilitation or were qualified to perform the essential functions or duties of a job with reasonable accommodation, or did voluntarily submit to disability retirement.

3. At all times hereinafter mentioned the State of New York was and still is one

of the fifty states of the United States, and an employer subject to laws invoked herein. Its Executive Branch and Legislative Branch members were charge with the duty to conform with the requirements of federal laws respecting pension rights, non-discrimination against disabled employees of the state government and employees of the political subdivisions thereof and were charged with various obligations respecting provisions of federal law.

4. The defendant New York State Assembly and New York State Senate, and defendants JOSEPH BRUNO, Majority leader of the senate and RONALD STAFFORD, of the senate Finance Committee, and counsels DAVID DUDLEY, WILLIAM DOUGHERTY and VICTOR FARLEY were and still are employees of the New York State Legislature, and as such, are precluded from exercising official Executive Branch functions.

5. Defendant George Pataki is Governor of the State of New York and its chief executive officer in the exercise of Executive Branch functions, and is the chief law enforcement officer of the State of New York responsible for compliance with federal and state constitutional and statutory provisions respecting employment and related issues.

6. At all times hereinafter mentioned the defendant City of New York, defendant RUDOLPH GIULIANI is its chief Executive officer and he and the employees of the

City of New York which is an employer as defined by various federal laws and charged with the duty to conform with the requirements of federal and state constitutional and statutory provisions and laws respecting pension rights, non-discrimination against disabled employees of the city employees and were charged with various obligations respecting enforcement of various provisions of federal law pertaining to employement and related matters.

7. The New York City Mayor's Office of Labor Relations is an executive branch agency responsible for negotiation and setting of employment policy and has a responsibility to comply with federal laws respecting conditions of employment, retirement and related issues.

8. At all times hereinafter mentioned the Board of Trustees of the New York City Police Officers Variable Supplements Fund were and still are persons acting in a governmental capacity and are required to comply with the provisions of federal law.

9. At all times hereinafter mentioned the Board of Trustees of the of the Police Superior Officers Variable Supplements Fund are persons acting in a governmental capacity and are required to comply with the provisions of federal law.

10. The defendant William Bratton is the New York City Police Commissioner was successor to preceding Police Commissioners and was and is the chief

executive officer of the New York City Police Department and and appointing authority for memebers thereof and who exercised governmental authority respecting the terms and conditions by which a memeber left or retired from police service.

11. The defendant Allen Hevesi is Comptroller of the City of New York and is a trustee of the Police Pension Fund, The Police Officer Variable Supplement fund and hte Superior Officers Variable Supplements fund, and as such exercises governmental authority, with responsibility to comply with federal laws respecting employment and terms and conditions thereof.

12. The Defendant Board of Trustees of the Police Pension Fund, exercise governmental authority and have a fiduciary duty to the members of the Police Pension fund, including the plaintiffs herein.

13. The defendant Board of Trustees of the Police Officers' Variable Supplements Fund and the Defendant Board of Trustees of the Superior Officers Variable Supplements Fund exercise governmental authority and have a fiduciary duty of the memebers of the Police Pension Fund including the plaintiffs herein.

14. None of the defendants have immunity under the 11th Amendment from enforcement of various federal laws

respecting deprivation of benefits to active or retired employees of state or local governmental agencies.

FACTUAL ALLEGATIONS

15. Heretofore, the People of the State of New York did enact through appropriate political action the Constitution of the State of New York.

16. The Constitution of the State of New York, Article II, section 1 provides that the legislative power of the state shall be vested in the senate and assembly.

17. The Constitution of the State of New York, Article IV, provides that executive power is vested in the governor.

18. It is a violation separation of powers provided for the legislative branch to engage in executive branch functions.

19. If the legislative branch of state government engages in executive branch functions, such act is ultra vires and invalid.

20. Heretofore, each of the plaintiffs when employed as New York City Police officers and superior officers and were members of the New York City Police Pension Fund, Arts. I and II.

21. Heretofore, in response to prior efforts on the part of state government or the political subdivisions thereof to take moneys from the pension funds of public employees and use it for general purposes

of the needs of the state or municipal governments, the Constitution of the State of New York was amended by the enactment of Article V, Section 7, which provided that after July first, nineteen hundred forty, membership in any pension or retirement system shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

22. Under the provision of New York Executive Law, Section 650, it is provided that the labor negotiations between the government and its employees is an Executive Branch function.

23. In and before 1968, the City of New York and the certified labor unions of the members of the New York City Police Department and the New York City Fire Departments did engage in labor contract negotiations.

24. As a result of the negotiations as aforesaid, a provision was agreed to which in part provided for the creation of a SUPPLEMENTAL PENSION FUND, wherein the City and the labor associations agreed to cause to be paid over to a separate fund, established within the present Police Pension Fund, those moneys which represented the income of the Police Pension fund which exceeded the income which would have been realized from investments in fixed income securities.

25. The purpose of the Supplemental Pension fund was to provide a supplemental Benefit on a variable annuity basis, for

Articles I and II as determined by the trustees. All of the plaintiffs are members of the Police Pension Fund, Articles I or II.

26. The contract did not exclude any member of the Police Pension Fund, article I and II from the benefits of the Supplemental Pension Fund.

27. The members of the Police Pension Fund Articles I and II who voted on whether or not to accept the terms of the contract did not vote on a contract that contained any exclusion of any member from the benefits of the Supplemental Pension Fund.

28. In order to give legal effect to the contract as negotiated and agreed to, certain enabling legislation was required.

29. The New York State Legislature did enact Section 876 of the Laws of 1970, which was intended to effectuate the terms of the Collective Bargaining Agreement as aforesaid with respect to the New York City Police Officers' Variable Supplements Fund and the New York City Police Officers' Variable Supplements Fund and the New York City Superior Officers' Variable Supplements Fund.

30. The power of the New York State Legislature was limited to either effecting the terms of the Collective bargaining agreement, or remanding it to the contracting parties for further negotiation should the legislature decline to effectuate it as written.

31. The legislature did not have the power or authority to vary the terms of the collective bargaining agreement, the negotiation of which is and was and Executive Branch function.

32. As a result of passing the enabling legislation, the defendants Board of Trustees the Police Officer's Variable Supplements Fund and the Board of Trustees of the Police Superior Officers' Variable Supplements Fund were established to administer the funds (Hereinafter VSFs) and to make provision from time to time for payment of sums on a variable basis to retired members of the New York City Police Department.

33. By reason of interpretation of the enabling legislation by the Boards of Trustees of both variable supplements funds, the plaintiffs are being deprived of the payment of the variable supplement benefit solely by reason of the fact that they left service as disabled persons.

34. The two variable supplement funds are funded by moneys belonging to the Police Pension Fund, and all plaintiffs were and are members thereof.

35. Payments of the VSFs are made periodically and each failure or refusal on the part of the defendants to pay the plaintiffs the benefit constitutes a new and separate violation of state and federal law.

36. In 1968 during the contract negotiations, William V. Cosgrove was

President of the Lieutenant Benevolent Association, NYCPD and James T. Kelly was President of the Detectives Endowment Association - NYPD and negotiated the collective bargaining agreement on behalf of those organizations. The members of the New York City Police Department who voted to approve the contract did not vote on a contract which contained any exclusion of any member of the Police Pension Fund Arts. I and II from the benefits of the Variable Supplements fund.

37. No representative of any of the unions during the negotiations which gave rise to the 1969 contract agreed to exclude any member from the benefits of the Variable Supplement Fund who were destined to be retired for either service connected or ordinary disability.

38. The New York City Police Department, through its authorized employees, agents and representatives have determined that each of the plaintiffs are suffering from a disability of such severity as to render that plaintiff handicapped and subject to a substantial limitation of a major life activity or significant impairment, or are or were under the impression that the plaintiffs were so disabled.

39. Each of the plaintiffs were retired for service connected disability, either ordinary or line of duty.

40. Each of the plaintiffs at the time of their retirement were disabled or

were perceived by the New York City Police Department and its pension and medical boards to be suffering from a disability.

41. Those plaintiffs who did not voluntarily retire on disability but were forced out were not afforded an accommodation in order to continue on the job.

42. None of the plaintiffs who were involuntarily separated were permitted to have rehabilitative procedures followed after they were pronounced disabled by the medical or executive personnel of the New York City Police Department or by the employees of the City of New York.

43. The New York City Police Department has caused various pamphlets to be issued and distributed which describes the pension situation of those members who retired after 20 years without disability, those who retired because of service connected disability and those who retired for ordinary disability. The pertinent examples and pages therefrom are annexed hereto as if more fully incorporated herein at length. The majority of plaintiffs were not informed at the time they retired on disability that they had any option respecting the Variable Supplement benefit. Those who were compelled to retire before their 20th year had no option at all respecting the VSF benefit, which was denied to them solely by reason of their disability.

44. The funding of the Police

Officer's Variable Supplements Fund (POVSF) and the Superior Officers Variable Supplements Fund (SOVSF) is from assets of the Police Pension Fund, Arts. I and II of which all the plaintiffs were and are members.

45. The payment of the Variable Supplement is the payment of a benefit.

46. Under the terms of legislation passed by the State of New York, the VSF was described as not being a pension benefit.

47. All of the plaintiffs herein are deprived of the payment of the VSF benefit because they were or are suffering or are perceived by the defendant City of New York and its employees to be suffering from a disability which caused their separation from employment as a member of the New York City Police Department.

48. The funding of the Variable Supplements Funds is as follows: Chapter 876 of the Laws of 1970, which was the implementing statute, provided generally that the Police VSFs were to receive the benefit of the earnings of equities that would be held by the Police Pension Fund (PFS), pursuant to the expanded investment authority set forth in Chapter 876, Section 4 of Chapter 876 amended former Code Section B18-28.0 by adding subsection b, which, inter alia, specifically authorized the PFS to invest up to 50% of its assets in common stock. The statute provided that in each fiscal year that the

earnings that were generated by the Fund's equities (ie., stocks) exceeded the hypothetical earnings that would have been generated by an equal amount of fixed income obligations (ie. bonds), such excess (the "transferable earnings or "skim" would be transferred to the VSFs. The amounts so transferred were divided between the Police Officer's Variable Supplements Fund (POVSF) and Police Superior Officers' Variable Supplements Fund pursuant to a statutory formula set forth in Chapter 876.

The Board of Trustees of the POVSF had broad discretion to decide whether to pay the variable supplement benefit in any given year, and if so, in what amount. Former Section 13-271(a) of the Code. For Calendar years 1977 thought 1984, the Board of Trustees of the POVSF authorized the VSF payments of $40 per month ($480 per year); for the year 1985, the Board authorized payments of $60 per month (720 per year); for 1986 it authorized payments of $80 per month ($960 per year); and for 1987 and 1988, it authorized payments of $150 per month (1800 per year).

Chapter 247 of the Laws of 1988 ("Chapter 247"0 revised the POVSF funding mechanism. Them amended statute provides each POVSF beneficiary an annual payment in a specified amount, steadily increasing from 2,500 in 1988 to $12,000 in 2007 and thereafter, regardless of the performance of the investment portfolio of the PFS nor

of any other factor.

Chapter 247 limited the total amount transferred from the PFS to the POVSF to the amount necessary to fund the defined POVSF benefits set forth in Chapter 247. Section 13-232.1(e) and (f) of the code. In addition, Chapter 247 Required the immediate transfer of 75 million dollars from the POVSF to the general fund of New York City.

The Superior Officers' Variable Supplements fund became a defined benefit by reason of Laws 1993 Ch. 479, which provided for $5,000 payment in 1993 and steadily increasing $500 per year to the year 2007 when it reaches $12,000 and remains the constant thereafter unless renegotiated to a larger amount. The section also provided for a transfer of approximately $51,750.000 of the funds' assets to the general fund of the City of New York.

49. That the plaintiffs are being deprived of the benefit or the payment of the VSF by reason of the fact that they retired under a provisions for retirement of persons with a disability. The plaintiffs as members of the Police Pension Fund did not agree to the transfer of moneys generated by the Police Pension Fund to the general fund of the city of New York, which transfer was and is a violation of the New York State Constitution, Art V, Sec. 7 as set forth hereinabove.

50. The plaintiffs are being deprived of the benefits of the V.S. by the defendant trustees upon the assumption that the Collective Bargaining Agreement of 1968, which was conspicuously silent with respect to any exclusions from such benefit of any member of the Police Pension Fund Article I and Article II, on the assumption that the New York State Legislature provided for the payment of the benefit only to retirees who retired after 20 years without a disability.

51. The New York Legislature did not provide for the exclusion of any member of Article I or Article II in passing the enabling legislation.

52. The terms and conditions of a Collective Bargaining Agreement are brought about by negotiation between the City of New York through the Defendant Mayor's Office of Labor Relations and its police unions. Such negotiation is, by definition, an Executive Branch function.

53. The New York State Legislature did not intended to provide for exclusions which were not set forth in the Collective Bargaining Agreement as voted on by the membership of the unions.

54. The New York State Legislature did not have the power to provide for exclusions which were not set forth in the collective bargaining agreement as voted by the membership of the unions, as the legislature's power is limited to legislative branch functions as set forth

hereinabove.

55. Heretofore, requests for a legislative inquiry were made by various plaintiffs to the New York State Legislature in the exercise of their First Amendment right in that they were being excluded from the payment of the variable supplement benefit, such inquiry to investigate the circumstances under which the various statutes were worded originally, amended, and interpreted with respect to payment of the VSF payments, during various yearly sessions of the Legislature. In 1994 and 1995, the New York State Assembly unanimously supported the creation of a body to conduct such investigation into how it came to pass that disabled police retirees were being denied the benefit, whether the legislature intended or had the power to provide for exclusion of disabled members and related matters. Although supported by numerous State senators, the defendants Senator Bruno, successor to Senator Ralph Marino as Majority Leader of the Senate, Senator Ronald Stafford as member of the Finance Committee of the New York State Senate, and defendants Dudley, Daugherty and Farley as counsel, did take steps which perpetuated and continue to perpetuate the violations of federal laws relating to deprivation of employment fringe and other benefits to persons suffering or perceived to be suffering form disability by blocking a senate fair

vote.

The actions of these defendants were to perpetuate the deprivation of the plaintiffs from the VSF payment of the benefit solely by reason of the disability of the plaintiffs, and at the behest of the defendants Police Benevolent Association, Sergeants' Benevolent Association, Detectives Endowment Association, Lieutenants' Benevolent Association and the Superior Officers' Council as presently comprised. The request of the plaintiffs was and is an effort to seek redress of grievances under the First Amendment to the United States Constitution. The purpose of the inquiry was to determine if the wording of the enabling statute creating the VSFs was in conformity with the terms of the collective bargaining agreement as negotiated and voted upon by the members of the police service, whether the wording was in conformity with the original home rule message of the City of New York requesting the legislature to pass enabling legislation, and whether the interpretation of the legislation and implementation of its terms resulted in an unintended or illegal exclusion of disabled retirees from the payments of the VSFs, and whether the interpretation or legislation as written was brought about by misfeasance, nonfeasance, malfeasance or fraud.

56. The defendant Rudolph Giuliani as

chief executive officer of the City of New York and the defendant George Pataki as chief executive officer of the State of New York, and the defendant William Bratton as Police Commissioner of the City of New York and chief executive officer of the Police Department had a duty to enforce federal laws respecting prohibitions against depriving disabled employees and retirees. They and their predecessors in office have failed and neglected to exonerate the requirements of federal laws with respect thereto, although requested to take action at the request of or on behalf of the plaintiffs.

AS AND FOR A FIRST CAUSE OF ACTION

57. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

58. Each of the plaintiffs is a retired New York City Police Officer (hereinafter "Police Officer") or Police Superior Officer (Hereinafter sometime "Superior Officer:) receiving a retirement allowance or pension (hereinafter "pension") pursuant to the provisions of the New York State Retirement and Social Security Law and/or the Administrative Code of the City of New York (hereinafter the "Administrative Code"" all hereinafter

collectively the "pension laws"), by reason of having been employed as a Police Officer or Superior Officer by the New York City Police Department and having served in such employment for the minimum number of years required for such retirement, or having become disabled during the course of such employment or otherwise having become disabled.

59. Chapters 876 of the Laws of 1970 amended the Administrative Code § 13-268 et seq. To establish the Police Officers Variable Supplements Fund and the Police Superior Officers Variable Supplements Fund (all collectively the "Police Officers Variable Supplements Fund" (VFSs) pursuant to which a reserve was created from the profits annually generated by the New York City Police Pension Fund and which was to be transferred annually to such variable supplements fund and distributed by the Trustees of such funds in the form of variable supplemental benefits (hereinafter the "variable supplemental benefit") to City Police Officers who retired on or after October 1, 1968 and were otherwise entitled to receive pension benefits (hereinafter "who retired after October 1, 1968) in order to provide equitable cost of living allowances to such retired City Police Officers in addition to other cost of living increases provided by the pension laws.

60. The payment of variable

supplemental benefits is a right, benefit and privilege as defined under Administrative Code §B3- 36.3(j) (2) and is a right, benefit and privilege to which all Police Officers and Superior Officers are entitled under the provisions of the collective bargaining agreement which was conspicuously silent with respect of any exclusions.

61. The receipt by some City Police Officers who retired after twenty years without disability after October 1, 1968, of a variable supplemental benefit from the Police Officers Variable Supplements fund since on or about January 1, 1976 and guaranteed defined supplemental benefits since December 15, 1989 and guaranteed defined supplemental benefits since December 15, 1989 as aforesaid, constitutes the receipt of a benefit and privilege as a member of the police pension fund as defined in Administrative Code §B-3-36 (j)(2) as aforesaid.

62. Pursuant to Chapter 247 of the Laws of 1988, the Administrative Code was amended with respect to City Police Officers, but not City Superior Officers, to provide inter alia, at Section 13-268 et. Seq., that City Police Officers shall on each December 15th commencing December 15, 1989, receive a fixed guaranteed supplemental benefit (hereinafter "guaranteed defined supplemental benefit") in lieu of a variable supplemental benefit, in accordance with the following

schedule:

CALENDAR YEAR	SUPPLEMENT
1989	$3,000
1990	$3,500
1991	$4,000
1992	$4,500
1993	$5,000
1994	$5,500
1995	$6,000
1996	$6,500
1997	$7,000
1998	$7,500
1999	$8,000
2000	$8,500
2001	$9,000
2002	$9,500
2003	$10,000
2004	$10,500
2005	$11,000
2006	$11,500
2007and each calendar year thereafter	$12,000

In 1993 the Superior Officers variable supplement payments became a defined benefit by reason of Chapter 479 of the laws of 1993 whereby the payment in calendar year was $5,000 and proceeded as thereafter in $500 increments annually as set forth for the police officers' defined benefit.

63. By reason of the foregoing, certain City Police Officers have received

since December 15, 1989, and since 1993 they and superior officers are receiving and will continue to receive a guaranteed defined supplemental benefit in accordance with the aforesaid schedule, because they did not retire by reason of disability. Had they retired by reason of disability or disability perceived by the employer to be a disability, they, like the plaintiffs, would not be receiving the VSFs.

64. Notwithstanding the receipt by some City Police Officers of a variable supplemental benefit since the time of their retirement after October 1, 1968 because either the individual plaintiff suffered from a disability which caused he or she to retire or their employer perceived that the plaintiff suffered from a disability and forced them to retire.

65. The exclusion of disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit on the basis of the existence of plaintiffs real or perceived disability violates Section 504 of the Rehabilitation Act, 29 U.S.C. §794, which provides, in pertinent part, as follows:

> No otherwise qualified individual with a disability in the United States, as defined in §706(8) of this title, shall, solely by reason of her or his disability, be excluded from the

> participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

66. The New York City Police Department, as a program or activity that received Federal financial assistance, is covered under section 504 of the Rehabilitation Act, 29 U.S.C. §794.

67. By reason of the foregoing, the plaintiffs and each of them who retired with a disability, are entitled to a declaratory judgment that they are entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits.

68. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects plaintiffs violates Section 504 of the Rehabilitation Act, 29 U.S.C. §794 because it denies plaintiffs, as qualified individuals with a disability, the benefit of the Variable Supplement Fund payments currently received and enjoyed by City Police Officers who do not suffer from a disability when they retired.

69. By reason of the foregoing, the plaintiffs and each of them are entitled

to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay VSF or defined benefits to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplement benefits and guaranteed defined supplement benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving the benefit, in the past now and in the future.

AS AND FOR A SECOND CAUSE OF ACTION

70. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

71. Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983, provides, in pertinent part, as follows:

> (A) Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, suit in equity, or other proper proceeding for redress.

72. The exclusion of disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit on the basis of the existence of plaintiffs real or perceived disability violates Section 504 of the Rehabilitation Act, 29 U.S.C. §794 and, thus, is discrimination which is prohibited under section 1983 of the Civil Rights Act of 1871, 42 U.S.C.§1983.

73. By reason of the foregoing, the plaintiffs and each of them who retired with a disability, are entitled to a declaratory judgment that they are entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits.

74. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects plaintiffs violates section 1983 of the Civil Rights Act of 1871, 42 U.S.C §1983 because it denies plaintiffs as qualified individuals with a disability, the right of and privilege to the Variable

Supplement Fund payments currently received and enjoyed by City Police Officers who do not suffer from a disability.

75. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplemental benefits and guaranteed defined supplemental benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving it in the past, now and in the future.

AS AND FOR A THIRD CAUSE OF ACTION

76. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

77. The payment of variable supplement benefits is a right, benefit and privilege as defined under Administrative Code §B3-36.3 (j) (2) and is a fringe benefit of employment as defined under section 1630.4 (f) of the

Americans With Disabilities Act, 42 Officers are entitled.

78. The receipt by some City Police Officers who retired for service after October 1, 1968 of a variable supplement benefit from the Police Officers variable supplements fund since on or about January 1, 1976 and guaranteed defined supplemental pension benefits since December 15, 1989 as aforesaid, constitutes the receipt of a fringe benefit as a member of the police pension fund.

79. The exclusion of the disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit on the basis of the existence of plaintiffs' real or perceived disability violated Title I, Section 1630.8 of the Americas With disabilities Act, 42 U.S.C. §12111 which provides, in pertinent part as follows:

> It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual is known to have a family, business, social or other relationship or association.

80. By reason of the foregoing, the plaintiffs and each of them who retired

with a disability, are entitled to a declaratory judgment that they are entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but no limited to variable supplemental benefits and guaranteed defined supplemental benefits.

81. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects plaintiffs violated Title I, Section 1630.8 of the Americans With Disabilities Act, 42 U.S.C.§12111 et 1630.8 of the Americans With Disabilities Act, 42, U.S.C.§12111 et seq. Because it denies plaintiffs, as qualified individuals with a disability, the fringe benefit of the Variable Supplement Fund payments currently received and enjoyed by City Police Officers who did not suffer from a disability.

82. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay pension benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplemental benefits and guaranteed defined supplemental pension benefits at the same time and in the same amount as the amount

paid to those City Police Officers and Superior Officers receiving the benefit, in the past, now and in the future.

AS AND FOR A FOURTH CAUSE OF ACTION

83. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

84. The exclusion of disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit on the basis of the existence of plaintiffs real or perceived disability violates Sections 504 of the Rehabilitation Act, 29 U.S.C. §794 and, thus, is discrimination which is prohibited under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983.

85. By reason of the foregoing, the plaintiffs and each of them who retired with a disability, are entitled to a declaratory judgment that they are entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits.

86. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects

plaintiffs violates section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983 because it denies plaintiffs as qualified individuals with a disability, the right of and privilege to the Variable Supplement Fund payments currently received and enjoyed by City Police Officers who do not suffer from a disability.

87. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplemental benefits and guaranteed defined supplement benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving the benefit in the past, now and in the future.

AS AND FOR A SIXTH CAUSE OF ACTION

88. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force herein.

89. The exclusion of disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit on the basis of the existence of plaintiffs real

or perceived disability violates Section 504 of the Rehabilitation Act, 29 U.S.C. §794, as aforesaid.

90. Pursuant to the provisions of section 35.140 of the Americans With Disabilities Act, 42 U.S.C.§12111, the denial of Variable Supplement Fund payments to disabled plaintiffs is the deprivation of a service, program or activity and thus, violates section 504 of the Rehabilitation Act and is the discrimination of an individual in employment on the basis of a disability.

91. Accordingly, the exclusion of the disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit on the basis of the existence of plaintiffs real or perceived disability violates Title II, Section 35.140 of the Americans With Disabilities Act, 42 U.S.C. §12111, et. Seq., which provides, in pertinent part, as follows:

> No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

92. By reason of the foregoing, the plaintiffs and each of them who retired with a disability, are entitled to a declaratory judgment that they are

entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits.

93. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects plaintiffs is a violation of Title II, section 35.150 of the Americans With Disabilities Act, 42 U.S.C. §1211 because it denies plaintiffs, as qualified individuals with a disability, the fringe benefit of the Variable Supplement Fund payments currently received and enjoyed by City Police Officers who do not suffer from a disability.

94. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplemental benefits and guaranteed defined supplemental benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers the benefit, in the past, now and in the future.

AS AND FOR A SEVENTH CAUSE OF ACTION

95. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

96. The exclusion of disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit on the basis of the Section 504 of the Rehabilitation Act, 29 U.S.C. §794 and, thus, is discrimination which is prohibited under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983.

97. By reason of the foregoing, the plaintiffs and each of them who retired with a disability, are entitled to a declaratory judgment that they are entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits.

98. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects plaintiffs violates section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983 because it denies plaintiffs as qualified individuals with a disability, the right of and privilege to the Variable

supplement Fund payments currently received and enjoyed by City Police Officers who do not suffer from a disability.

99. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay pension benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplemental benefits and guaranteed defined supplemental benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving the benefit, now or in the future. Superior Officers the benefit, in the past now or in the future.

AS AND FOR AN EIGHTH CAUSE OF ACTION

100. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

101. The payment of variable supplemental pension benefits is a right, benefit and privilege as defined under Administrative Code §B3-36.3(j) (2) and is a right, benefit and privilege to which all Police Officers and Superior Officers

are entitled.

102. The receipt by some city Police Officers who were not declared disabled when they retired after October 1, 1968 of a variable supplemental benefit from the Police Officers variable supplements fund since on or about January 1, 1976 and guaranteed defined supplemental benefits since December 15, 1989 as aforesaid, constitutes the receipt of a benefit and privilege as a member of the police pension fund as defined in Administrative Code §B-3-36 (j) (2) as aforesaid.

103. The exclusion of the disabled plaintiffs from sharing in the Variable Supplement Fund payment benefit particularly the fixed benefit payment, on the basis of the date of plaintiffs' retirement, insofar as such may be by reason of disability precipitated by age or passage of time and older retirees were and are excluded from such benefit violates section §623 which provides, in pertinent part, as follows:

> or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

104. By reason of the foregoing, the

plaintiffs and each of them who retired prior to passage of the defined benefit provisions of the VSFs are entitled to a declaratory judgment that they are entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits.

105. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects plaintiffs violates section 623 of the Age Discrimination in Employment Act. 29 U.S.C. §623, because it denies plaintiffs, as qualified individuals, the privilege of the Variable Supplement Fund payments currently received and enjoyed by City Police Officers, solely because plaintiffs retired prior to passage of the defined benefit component of the VSFs and are older than those City Police Officers receiving the privilege.

106. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay pension benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as City Police Officers who retired prior to changing the benefit from a variable supplemental

benefits to a guaranteed defined supplemental variable supplemental benefits to a guaranteed defined supplemental benefit at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving the benefit in the past, now and in the future.

AS AND FOR AN NINTH CAUSE OF ACTION

107. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

108. The exclusion of plaintiffs who retired prior to when the variable supplement became a defined benefit from sharing in the Variable Supplement Fund payment benefit on the basis of plaintiffs retirement date violates section 504 of the Rehabilitation Act, 29 U.S.C. §794 and, thus, is discrimination which is prohibited under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983.

109. By reason of the foregoing, the plaintiffs who retired before the variable supplement became a defined benefit, are entitled to a declaratory judgment that they are entitled to the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental

benefits and guaranteed defined supplemental benefits.

110. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring the Variable Supplement Fund legislation as it effects plaintiffs violates section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983 because it denies plaintiffs as qualified individuals, the right of and privilege to the Variable Supplement Fund payments currently received and enjoyed by City Police Officers, solely because plaintiffs retired prior the time the variable supplement payment became a defined benefit are older than those City Police Officers receiving the privilege.

111. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay pension benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, variable supplemental benefits and guaranteed defined supplemental benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving the benefit in the past, now and in the future.

AS AND FOR A TENTH CAUSE OF ACTION

112. Plaintiffs repeat and reallege

each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

113. The exclusion of plaintiffs who retired because of disability and who are deprived of payments of the variable supplement and defined benefit paid to members who retired for other than disability reasons is a violation of federal laws aforesaid. The defendant State of New York and the Governor and neglected and refused to appropriately take legislative and executive action to exonerate the rights of the plaintiffs who are being denied a benefit by reason of disability.

114. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring such interpretation of state statues as precluding the plaintiffs from the benefit of the Variable Supplement Fund and the defined benefit fund as unconstitutional, and an ultra vires exercise of the legislative branch of an executive branch functions.

AS AND FOR AN ELEVENTH CAUSE OF ACTION

115. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the

same were fully set forth at length herein.

116. The exclusion of plaintiffs who retired because of disability and who are deprived of payments of the variable supplement and defined benefit paid to members who retired for other than disability reasons is a violation of federal laws as aforesaid. The City of New York and the mayor and police commissioner and their predecessors in office and employees of the city of New York and members of the defendant unions and members of the boards of trustees of the variable supplement funds and the Police Pension fund have failed, neglected and refused to appropriately take legislative and executive action to exonerate the rights of the plaintiffs who are being denied a benefit by reason of disability.

117. By reason of the foregoing, plaintiffs are entitled to a declaratory judgment and order declaring such interpretation of state statues as precluding the plaintiffs from the benefit of the Variable Supplemental Fund and the defined benefit fund as unconstitutional and an ultra vires exercise of the legislative branch of an executive branch function of the City of New York.

AS AND FOR A TWELFTH CAUSE OF ACTION

118. Plaintiffs repeat and reallege each and every allegation set forth in

paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

119. Section 6716 of the Revenue Sharing Act, 31 U.S.C. §6716, provides, in pertinent part, as follows:

> (A) No person in the United States shall be excluded from participating in, be denied the benefits of, or be subject to discrimination under, a program or activity of a State government or unit of general local government because of race, color, national origin, or sex when the government receives a payment under this chapter.
>
> (b) The following prohibitions and exemptions also apply to a program or activity of a State government or unit of general local government when the government receives a payment under this chapter:
>
> (1) a prohibition against discrimination because of age under the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)
>
> (2) a prohibition against discrimination against an otherwise qualified handicapped individual under section 504 of

the Rehabilitation Act of 1973 (29 U.S.C. 794)

120. The exclusion of disabled plaintiffs from sharing in the Variable supplement Fund payment benefit on the basis of the existence of plaintiffs real or perceived disability violates is discrimination which is prohibited under section 6716 of the Revenue Sharing Act as amended by Public Law, 99-272 Title XIV (a)(7), and Title VII of the Civil Rights Act of 1964.

121. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplement benefits and guaranteed defined supplement benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving the benefit in the past, now or in the future.

AS AN FOR A THIRTEENTH CAUSE OF ACTION

123. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the

same were fully set forth at length herein.

124. The exclusion of disabled plaintiffs from sharing in the Variable Supplement fund payment benefit on the basis of the existence of plaintiffs real or perceived disability violates Section 504 of the Rehabilitation Act, 29 U.S.C §794 and, thus, is discrimination which is prohibited under section 6716 of the Revenue Sharing Act as amended by Public Law 99-272, Title XIV (a)(7)

125. By reason of the foregoing, the plaintiffs and each of them who retired with a disability, are entitled to a declaratory judgment that defendants actions in denying plaintiffs the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits, is a violation of section 6716 of the Revenue Sharing Act.

126. By reason of the foregoing, the plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplement benefits and guaranteed defined supplement benefits at the same time and in the same amount as

the amount paid to those City Police Officers and Superior Officers receiving the benefit, in the past, now and in the future.

AS AND FOR A FOURTEENTH CAUSE OF ACTION

127. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" through "56" hereof with the same force and effect as though the same were fully set forth at length herein.

128.The exclusion of disabled plaintiffs from sharing in the Variable supplement Fund payment benefit on the basis of the existence of plaintiffs real or perceived disability violates is discrimination which is prohibited under section 6716 of the Revenue Sharing Act as amended by Public Law, 99-272 Title XIV (a)(7).

129. By reason of the foregoing, the plaintiffs and each of them who retired with a disability, are entitled to a declaratory judgment that defendants actions in denying plaintiffs the same benefits to which all retired City Police Officers and Superior Officers are entitled, including but not limited to variable supplemental benefits and guaranteed defined supplemental benefits, is a violation of section 6716 of the Revenue Sharing Act.

130. By reason of the foregoing, the

plaintiffs and each of them are entitled to a permanent injunction and order compelling the City of New York and each and every defendant who has the obligation or power to pay benefits, to City Police Officers and Superior Officers, to pay to the plaintiffs, as disabled City Police Officers, variable supplement benefits and guaranteed defined supplement benefits at the same time and in the same amount as the amount paid to those City Police Officers and Superior Officers receiving the benefit, in the past, now or in the future.

CONCLUSION

131. The acts, omissions, policies and practices of the defendants as described in the foregoing allegations constitute a pattern or practice of resistance to full enjoyment by qualified individuals from the benefits of the VSFs payments solely by reason of their disabilities or perceived disabilities, thereby violating their right to equal employment opportunities and related benefits without discrimination based on their disabilities. The pattern or practice denies the full exercise of the rights secured by Title I and II of the Americans with Disabilities Act of 1990; the Pension Reform Act, 1974; the Rehabilitation Act of 1973; the Age

Discrimination Act; the Revenue Sharing Act and the United State Constitution, First Amendment. Unless enjoined by order of this Court, defendants will continue to pursue policies and practices that are the same as or similar to those which are alleged in this Complaint.

WHEREFORE, plaintiffs demand judgment to have this court:

a. Declare that the collective bargaining agreement between the Defendant City of New York and its police unions in 1968 which provided for the establishment of variable supplement funds, as negotiated by the parties and as voted on by the members F.O. the New York City Police Department did not contain any exclusion of any member of the New York City Police Pension Fund, Arts. I and II from the benefits and payments of the Variable Supplement Funds upon retirement.

b. Declare that the New York State Legislature in passing the agreement, did not have the power or intention to provide for an exclusion of members of the Police Pension Fund from the benefits of the Variable Supplement Funds payment.

c. Declare that any act of the New York State Legislature which purports to work any exclusion of any member of the New York City Police Pension Fund to be an exercise of Executive power and hence ultra vires and violative of the New York Constitution, Art. II Section I and Article IV, and is invalid, and violative

of federal laws as hereinabove alleged.

d. Declare that the determination of the Board of Trustees of the Police Officer's Variable Supplements Fund and the Police Superior Officer's Variable Supplement benefits and the later defined benefit of the funds to the plaintiffs by reason of their having retired on disability and not to do so in the future, to be invalid, and to order that past and future payments of the VSF benefits be paid to the plaintiffs to the same extent and in the same amount as that received by other members of the Police Pension Fund who have been or are receiving the benefit.

e. Enjoin the defendants, their officers, agents, employees, successors, assigns and all persons in active consent or participation with them from engaging in discriminatory practices against the plaintiffs by reason of plaintiffs' disability or perceived disability, and from enforcing policies or practices which are the same or similar to these alleged in this Complaint.

f. Enjoin the defendants the State of New York , and the City of New York, and the Boards of Trustees of the Police Pension Fund, the Police Officer's Variable Supplements Fund and the Police Superior Officers' Variable Supplements Fund and their officers, agents, employees, successors, assigns and all persons in active concert or participation

with them from refusing to award full make-whole payments F.O. the VSF benefits to the plaintiffs who have not been paid VSF benefits as a result of the policies and practices alleged in this complaint.

Plaintiffs further request such additional relief as is consistent with the provisions of law as to the court may seem just and proper together with costs of this action and reasonable attorney fees.

Supreme Court, U.S.
FILED
JUL 6
OFFICE OF THE CLERK

No. 97-1961

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PETER CASTELLANO, et al.,

Petitioners,

- against -

THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF IN OPPOSITION

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June 17, 1998.

COUNTER-QUESTION PRESENTED

Should this Court deny the petition for a writ of certiorari, in that the decision of the Court of Appeals does not present any issue of federal law which merits review by this Court?

TABLE OF CONTENTS

Page

COUNTER-QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI. 9

A. The Court of Appeals correctly applied established rules of law in holding that petitioners failed to state a claim of discrimination on the basis of disability. 9

B. The Court of Appeals correctly applied established rules of law in holding that the District Court had not denied petitioners any constitutional right to discovery. 13

C. The Court of Appeals did not violate petitioners' constitutional rights by denying their motion for rehearing. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases: Page

Felde v. City of San Jose,
839 F.Supp. 708 (N.D. Cal. 1994)
aff'd, 66 F.3d 335 (9th Cir. 1995) . . . . . .

Gagliardo v. Dinkins,
89 N.Y.2d 62 (1996) . . . . . .

No. 97-1961

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PETER CASTELLANO, et al.

Petitioners

- against -

THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I

In this civil action, the petitioners are approximately two thousand former New York City police officers who retired because of disability. They challenge a New York statutory program which provides certain monetary benefits

(entitled variable supplements fund benefits) to police officers who retire for service after at least twenty years, but not to disability retirees. Petitioners challenge the statutory program primarily as discriminatory under the Americans with Disabilities Act and the Rehabilitation Act.

The United States Court of Appeals for the Second Circuit unanimously rejected that challenge in an opinion which appears in petitioners' appendix at pages A1 through A51. Petitioners seek review of that decision on the merits. The Court of Appeals also rejected an argument that petitioners were denied an opportunity for discovery. They seek to have this Court review that decision also.

The Court of Appeals also denied petitioners' motion for rehearing in an order which appears in petitioners' appendix at pages A73 through A74. Petitioners also seek to have this Court review that order.

II

All of the petitioners are retired New York City police officers who receive retirement benefits from the Police Pension Fund. That fund is governed by Subchapter 2 of Chapter 2 of Title 13 of the New York City Administrative Code.

At issue in this case are two basic types of retirement under the Police Pension Fund: retirement for service and retirement for disability. Retirement for disability can be for ordinary disability or for accident disability. In order to retire for service, a police officer must have rendered a minimum of twenty years of service. Administrative Code §§ 13-246 - 13-248. The officer then receives an annual retirement allowance equal to one-half of his final salary, plus one-sixtieth of his or her average annual earnings after his twentieth anniversary, adjusted by several other factors not pertinent here. Administrative

Code § 13-255. The retirement allowance is subject to federal income taxation. None of the petitioners have retired for service.

In order to retire for accident disability, an officer must be physically or mentally incapacitated from performing his or her duties as a result of an accidental injury suffered in the line of duty. Administrative Code § 13-252. Accident disability benefits are particularly coveted. An officer retiring for accident disability receives a pension of three-quarters of his or her final salary, irrespective of length of service. Administrative Code § 13-258. This retiree also receives an annuity funded by his or her member contributions and an Increased Take Home Pay pension funded by the City. Id. Those accident disability retirees who have worked beyond twenty years also receive an additional pension equal to one-sixtieth of total earnings received after the twentieth anniversary. New York

General Municipal Law § 207-d. Moreover, this retirement allowance is fully excludable from federal income taxation and qualifies for a tax exemption under Section 104(a)(1) of the Internal Revenue Code. Some of the petitioners retired for accident disability.

In order to retire for ordinary disability, an officer must be physically or mentally incapacitated from performing his or her duties as a result of something other than an accidental injury suffered in the line of duty. Administrative Code § 13-251. An officer who retires for ordinary disability receives a retirement allowance of one-third of his or her final salary if he or she served less than ten years. Administrative Code § 13-257. The officer receives a retirement allowance of one-half of his or her final salary if he or she served at least ten but less than twenty years. Id. An ordinary disability retiree with greater than twenty years of service receives an additional

allowance equal to one-fortieth of the final salary times years of service beyond the twentieth anniversary. Id. Using the higher fractional rate and the final year's salary as the pensionable compensation base, rather than the average of all years beyond twenty, provides a significant advantage for the ordinary disability retiree. By contrast, the base for the corresponding additional allowance for service retirees and accident disability retirees is the average salary received after the twentieth anniversary. Moreover, a portion of the first $5,000 of income is eligible for a federal tax credit as long as a member qualifies for Social Security disability payments. Internal Revenue Code § 22. The petitioners who did not retire for accident disability did retire for ordinary disability.

This review of the statutory provisions demonstrates that disability retirees (both ordinary and accident) enjoy certain pension benefits which service retirees do not.

III

Only police officers who retire for service receive variable supplements fund ("VSF") benefits. Subchapter 3 of Chapter 2 of Title 13 of the Administrative Code governs the Police Officer's Variable Supplements Fund. Administrative Code §§ 13-268 et seq. Subchapter 4 governs the Police Superior Officers' Variable Supplements Fund. Administrative Code §§ 13-278 et seq. The Police Officer's VSF pays a specific monetary sum to service retirees below the rank of sergeant, while the Police Superior Officers' VSF pays a similar sum to service retirees who held the rank of sergeant or higher or who were detectives. It is the statutory exclusion of disability retirees from these VSF benefits which petitioners challenge.

Administrative Code § 13-271 establishes a defined annual VSF benefit payment to each eligible police officer

retiree on a fixed schedule. Administrative Code § 13-280 does the same for eligible police superior officer retirees. By statute, only service retirees are eligible to receive these VSF benefits. Administrative Code §§ 13-268(5), 13-278(5). Disability retirees do not receive VSF benefits.

IV

The Court of Appeals affirmed the District Court's dismissal of petitioners' ADA cause of action for failure to state a claim upon which relief could be granted. That Court stated that disability retirees who did not work twenty or more years simply do not meet the VSF eligibility requirements, just as non-disabled police officers who do not work twenty or more years are not eligible (A35-A37). That Court further stated that disability retirees who did work twenty or more years had their option of either service or disability retirements and could not claim discrimination because they could not pick individual

desirable elements from the two benefit-package options (A37-A38). That Court further stated that petitioners' argument that they had been denied discovery "must be rejected as frivolous" (A49).

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

Petitioners present three grounds for review by this Court. None of these grounds presents a federal question worthy of review by this Court. None of the factors set forth in Rule 10 are present in this case.

A. The Court of Appeals correctly applied established rules of law in holding that petitioners failed to state a claim of discrimination on the basis of disability.

The Court of Appeals employed a dichotomy in analyzing the claims of the petitioners. One category of petitioner consisted of those who retired for disability after serving less than twenty years of service (A35-A37). The

other category consisted of those who retired for disability after serving twenty or more years of service (A37-A38). All of the petitioners fall into one of these two categories.

As to the petitioners who worked less than twenty years, the Court of Appeals held that the complaint failed to state a claim upon which relief could be granted (A35-A37). The Court stated its central holding as follows (A35-A36):

> The [petitioners who worked less than twenty years] are similarly situated not with twenty-year "for service" retirees, but with non-disabled retirees who retire after an equivalent period of service. Because the latter group is not entitled to VSF benefits, there is no unlawful discrimination.

The Court cited an EEOC commentary which stated that "[w]here an employer offers ... a service retirement plan, there is no ADA violation as long as the service retirement plan treats persons who are covered by the ADA the same as other employees" (A36). The Court also relied upon

Gagliardo v. Dinkins, 89 N.Y.2d 62 (1996), in which the New York Court of Appeals rejected an identical ADA claim raised by retired New York City Housing and Transit police officers (A36-A37). The Court of Appeals correctly concluded that "[t]he ADA requires only that persons with disabilities have the opportunity to receive the same benefits as non-disabled officers who have given an equivalent amount of service" (A37).

As to the petitioners who worked twenty or more years, the Court of Appeals again held that the complaint failed to state a claim upon which relief could be granted (A37-A38). The Court stated its central holding as follows (A38):

> Although the ADA is violated where "persons covered by the ADA who qualify for both a service retirement and disability retirement plan are required to take a disability benefit which is less advantageous," [citation omitted], nothing in the ADA requires an employer to provide to disabled employees the VSF benefits of a

> service plan in addition to freely-chosen disability benefits under a disability plan.

The Court relied upon Felde v. City of San Jose, 839 F. Supp. 708 (N.D. Cal. 1994), which later was affirmed without a reported decision, 66 F.3d 335 (9th Cir. 1995). All the petitioners who worked twenty or more years chose the benefits of a disability retirement. The Court of Appeals correctly held that no discrimination on the basis of disability is shown by the personal selection of one retirement plan over another.

Petitioners argue that this Court should review this case because of a split among the Courts of Appeals on the issue of whether a disabled retiree can be a qualified individual with a disability for purposes of the ADA (Petition, 7-11). Petitioners seek review by pointing to an issue on which they prevailed in this case. The Court of Appeals assumed that petitioners were qualified individuals with a disability without deciding the issue (A34). Review

of that issue would make no difference to the outcome of this case. Petitioners employ the dubious strategy of urging this Court to review this case on the basis of an issue which is not necessary to the outcome of the case, hoping that this Court will review the decision on the merits as an afterthought. This Court should deny certiorari on the merits of this case.

B. The Court of Appeals correctly applied established rules of law in holding that the District Court had not denied petitioners any constitutional right to discovery.

Petitioners make a rather obscure claim that the District Court violated their constitutional rights by dismissing the case before allowing them to conduct discovery (Petition, 15-17). This claim fails on its face, in that it does not point to any specific information which is both likely to result from discovery and relevant to whether the State has discriminated against the petitioners on the basis of disability. Instead, petitioners seek to cast a broad

net of discovery about the workings of the New York State Legislature (Petition, 16). The Court of Appeals rejected the claim as frivolous (A49). What makes the claim even more frivolous is that petitioners did not seek to conduct any discovery prior to the dismissal. This Court should deny certiorari as to petitioners' claim about discovery.

C. The Court of Appeals did not violate petitioners' constitutional rights by denying their motion for rehearing.

Petitioners argue that the Court of Appeals violated their constitutional rights to due process of the law and to equal protection of the law by denying their motion for rehearing (Petition, 11-15). This argument fails because petitioners' real complaint is with the decision on the merits by the Court of Appeals, not with the denial of the motion for rehearing.

Petitioners note that the Court of Appeals vacated the dismissal of a complaint brought by a retired New York

City firefighter in a separate case consolidated with this case for argument and decision (Petition, 11-12). That firefighter alleged that he had been forced to take a disability retirement after he had worked in excess of twenty years. The Court of Appeals remanded that case to the District Court for further consideration (A40-A42). Unlike that firefighter, petitioners did not plead any cause of action based on an absence of choice as to disability and service retirements for those who worked twenty or more years. The six forms of relief sought by petitioner in the complaint all address the absence of VSF benefits for disability retirees as such (A129-A131). They litigated this case on a different basis than did the firefighter to whom they refer.

The argument regarding rehearing does not present any federal issue worthy of review by this Court. This Court should deny certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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(3)

No. 97-1961

In the Supreme Court of the United States

October Term, 1997

Peter Castellano, et al.,

Petitioners,

v.

The City of New York, et al.

Respondents.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITIONERS' REPLY BRIEF

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13 pp

TABLE OF CONTENTS

Authorities Cited i

REPLY ARGUMENT

Point I: The Second Circuit assumed without deciding that the Petitioners are 'qualified individuals' within the meaning of the ADA provisions; the decision does not embrace the res judicata or collateral estoppel attributes of a prevailing party. 1

Point II: This case is amenable to a sua sponte pre-argument reversal. 9

Conclusion: BY REASON WHEREOF the Petition should be granted. 10

TABLE OF AUTHORITIES

Castellano et al. v Bd. of Trustees, et al., 737 F.2d 759 (2d Cir. 1991), cert. denied, 502 U.S. 941 (1991) 7

Erie Railroad Co. v Tompkins, 304 U.S. 64 (1938) 6

Gagliardo v Dinkins, 89 NY2d 62, 574 NE2d 298 (1996) 6, 10

J. Bacon & Sons v Martin, 305 380 (1939) 6

Lyons v Legal Aid Society, 58 F3d 1512 (2d Cir. 1995) 8

Minesotta ex rel. Pearson v Probate Ct. Of Ramsey Co., 309 U.S. 270 (1940) 6

Moore v Ill. Cent. Ry. Co., 312 U.S. 630 (1941) 6

Swift v Tyson, 41 U.S. 1 (1842) 6

Wainewright v Stone, 414 U.S. 21 (1971) 6

Wick v Chelan Elec. Co., 280 U.S. 108 (1929) 6

===

Constitution & Statutes

U.S. Constitution
First Amendment 7

Americans with Disabilities Act passim

REPLY ARGUMENT

Point I: The Second Circuit assumed without deciding that the Petitioners are 'qualified individuals' within the meaning of the ADA provisions; the decision does not embrace the res judicata or collateral estoppel attributes of a prevailing party.

The municipal respondents in their brief, p. 12, suggest that the Petition for certiorari should be denied with respect to the threshold question of the standing under the Americans with Disabilities Act [ADA] of the Petitioners to seek post-employment fringe benefits because the Petitioners prevailed on the issue in the 2d Circuit. At p. 13 they further contend that because the Petitioners prevailed they are using the conflict among the courts of appeals as a 'dubious strategy' and that that this Court to review as an 'afterthought'.

The most compelling basis for granting the petition is the existence, as here, of a conflict among the circuits. The rules do not state that a 'prevailing party' on the point cannot seek certiorari on the point especially when the 'prevailing party' did not ultimately prevail in the case. On p. 12 of their brief the municipal respondents correctly observe that at A34 that the Court of Appeals assumed that petitioners were qualified individuals under the ADA without deciding the issue.

This state of affairs does not amount to a final prevailing on the threshold question either by eliminating the conflict among the circuits or by conferring upon the Petitioners the essential elements of res judicata or collateral estoppel.

For example, should the Petitioners or others in other circuits now be, or in the future become, aware of other post-employment fringe benefits such as cost of living allowances, tax consequence benefits, medical insurance amendments or the like, the decision would be persuasive but not t preclusive on the threshold question of qualified individual under the ADA.

Meanwhile the conflict among the circuits would continue to fester precipitating further litigation and anguish until someday the matter is resolved by this Court. It is suggested that in the interest of stability that that someday is now.

As officials of New York State it is in the interest of the municipal and state respondents to exonerate their duty to see to it that the following issues are resolved by this Court.

A. Whether former employees who are perceived to be disabled are 'qualified individuals' under the ADA who have standing to seek post-employment fringe benefits, and,

B. Whether a circuit court is authorized to reject the construction of state law by a state's highest court, when it does not violate federal law.

Contention A: The 2d Circuit held:

> ...We hold that a former employee with a disability who 'with or without reasonable accommodation' could 'perform the essential functions of the employment position' for a period sufficient to establish entitlement to an employer-related fringe benefit (i.e.., who is otherwise entitled to receive a fringe benefit) is a 'qualified individual with a disability' within Title I of the ADA for the purpose of challenging alleged discrimination in the provision of that fringe benefit. (A34)

It is to the benefit the nation in having the conflict among the circuits resolved because of various important factors including:

1) The 2d Circuit has held that former employees who are perceived to be disabled have standing as qualified individuals under the ADA to seek post-employment fringe benefits. It is expected that disability retirement individuals in the 2d Circuit

[foreseeably including any surviving Petitioners] and other circuits will rely on this case as persuasive but not dispositive precedent in mounting future litigation, not in the state courts but in federal district courts. If this Court later overrules the 2d Circuit in another case, all those cases will be dismissed, resulting in unnecessary expenditure of court resources when the condition could have been eliminated by ruling at this juncture.

2) In the event this court at a later time upholds the 2d Circuit holding that former disabled employees have standing under the ADA as qualified individuals to seek post-employment fringe benefits, the state officials on a nationwide basis would not, in the intervening period, have had the benefit of a binding decision of this Court upon which to structure their programs and policies to conform to those ADA requirements. This would expose on a national basis those various state entities to future liabilities which would be avoided by a resolution of the conflict now.

In the event that the respondents are content to leave the threshold issue of standing as a qualified individual under the ADA binding on them and not considered by this Court, then it should constitute the 'law of the case' irrespective of any future action by this Court which may overrule the 2d Circuit's holding on

this issue in a later case. Moreover, when this case is remanded by reason of reversal by this Court on one or more of the other points in the petition, the respondents upon a loss in the lower courts on the merits the respondents should not be permitted to seek certiorari on the threshold issue of whether the Petitioners are or are not 'qualified individuals under the ADA, even if this Court in the intervening period determines that such persons are not qualified to seek post-employment fringe benefits.

Contention B: It is a matter of nationwide importance that state officials maintain the authority of the highest courts of the various states to define issues of state law, and to have that definition respected by and binding on all other state and federal courts.

It is the duty of the federal judiciary to afford litigants a meaningful right to petition for redress of grievances, which has the element of due process of law. Important elements of due process were denied the Petitioners by the courts below.

1. It is clearly established law and an element of due process that when a state's highest court construes a a state statute, such definition is binding on all other courts including the United States Supreme Court. This concept has been engrafted upon the

jurisprudence of the nation since as early as 1842 in Swift v Tyson, 41 US 1 (1842) and found expression later in Erie Railroad Co. v Tompkins,304 U.S. 64 (1938). See also: Moore v Ill. Cent. Ry. Co., 312 US 630(1941); Wainwright v Stone, 414 U.S. 21 (1973); Minnesota ex Rel Pearson v. Probate Court of Ramsey Co., 309 U.S. 270 (1940); Wick v Chelan Elec. Co., 280 U.S. 108 (1929); and J. Bacon & Sons v Martin, 305 U.S. 380 (1939).

The 2d Circuit at A39 verified awareness of the New York Court of Appeals case of Gagliardo v Dinkins, 89 NY2d 62, 574 NE 2d 298 (1996) construing the Variable Supplement Fund benefit as deferred compensation for services actually performed and not as a pension benefit.

The 2d Circuit had no authority to reject the binding effect of the Gagliardo VSF definition. By reason of this rejection it demonstrably deprived the petitioners of an important provable element of their case: that they were not being paid for work done because they retired on disability, and that the mode of retirement had no relevance to the fact that they were entitled to be paid for services rendered on the job.

No law in the country can be upheld which deprives a worker of wages for services performed without being considered a confiscation of property or the imposition of a condition of

involuntary servitude.

Were the VSF a pension benefit and not compensation for work performed while on the job, then arguably, but not to the degree of a 12(b)(6) dismissal, the mode of retirement would have some limited relevance.

What makes this stance by the 2d Circuit so overwhelmingly distressing is that in the case of Castellano et al v Bd. of Trustees, et al, 737 F.2d 759 (2d Cir. 1991, cert denied 502 U.S. 941 (1991) referred to in the decision and Petitioners' brief as 'Castellano I', many Petitioners here were plaintiffs, and the 2d Circuit specifically deferred to the N.Y. Court of Appeals to define the nature of the VSF benefit.

Now that the Petitioners have returned to the 2d Circuit with the authoritive and binding definition by the N.Y. Court of Appeals,the 2d Circuit, placing itself even above the Supreme Court of the United States, flat out refused to be bound by that definition. This presents a situation of constitutional and procedural chaos worthy of intervention by this Court.

If the definition is federally unconstitutional or violative of federal laws then theoretically it can be struck, which is not the case here.

Due process of law is a necessary component to the right to petition for

redress of grievances under the 1st Amendment. The petitioners are entitled to have the definition of the VSF benefit by the N.Y. Court of Appeals accepted by the 2d Circuit. The refusal to do so had a direct impact on the adverse holding.

(2) The district court and the 2d Circuit also deprived the Petitioners of a meaningful right to petition for redress of grievances by depriving the Petitioners of an answer and court-compelled discovery. This is not to suggest that every dismissal under 12(b)(6) is inappropriate because of the absence of discovery opportunity.

Where, as here, the complaint, par 55 at A99 documents legitimate efforts by the litigants to procure prelitigation information with which to pursue and prove a grievance which have been blocked by the state officials who now are defendants in the litigation in question, it was and is an abuse of discretion on the one hand, and a deprivation of a meaningful right to petition for redress of grievances on the other, to dismiss the complaint under such circumstances. See: Lyons v Legal Aid Society, 58 F3d 1512 (2d Cir. 1995), cited in the main brief at p.15.

The municipal defendants take the position that because the petitioners did not conduct discovery before the 12(b)(6) motion was granted dismissing the complaint, that fact somehow

undercuts the Petitioners' position at this juncture. The complaint was dismissed before the interposition of an answer. After an answer is served the issues are by any admissions of assertions in the complaint.

For example, there are assertions in the complaint paragraph 51-54 at A98 which allege that the New York State Legislature did not provide for the exclusion, intend or have the power to exclude any retired member of the Police Deparrtment from the VSF benefit. Also there are assertions in paragraphs 41-43 of the complaint at A94 alleging forced disability retirement and lack of option, factors to which both the district court and the circuit court gave particular importance, and which in fact later led to the remand of the case of firefighter Velardi. To expect a litigant to conduct discovery prior to service of an answer which might or might narrow the issues requiring discovery borders on the bizarre.

Point II: This case is amenable to a sua sponte pre-argument reversal

A determination by this Court that refusal of other courts to accept the binding effect of a state's highest court's construction of state laws is a deprivation of due process and destructive of the constitutional right to petition for redress of grievances in a meaningful way is clearly beneficial on a nationwide

basis. Moreover it could well justify a sua sponte reversal as well as after briefing and argument.

The fact that the VSF is deferred compensation for work performed is almost dispositive in favor of the Petitioners upon remand. This, together with the refusal of the 2d Circuit to be bound by the Gagliardo definition and the denial of court-compelled discovery provides a generous abundance of reason to justify a reversal sua sponte.

BY REASON WHEREOF, the Petition should be granted.

Dated: Hauppauge, N.Y. July 13, 1998.

Respectfully Submitted:

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